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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 273

HARRY BRIGGS, JR., ET AL.,

Appellants,

vs.

R. W. ELLIOTT, CHAIRMAN, J. D. CARSON AND GEORGE KENNEDY, MEMBERS OF THE BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

CIVIL ACTION NO. 2657

HARRY BRIGGS, JR., ET AL.,
Plaintiffs,

vs.

R. W. ELLIOTT, CHAIRMAN, ET AL.,
Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this case.

Opinion Below

The opinions of the District Court for the Eastern District of South Carolina, Charleston Division, have not yet been reported. A copy of each of the two opinions and of the judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on June 21, 1951. A petition for appeal is presented to the District Court herewith, to-wit, on July 20, 1951. The jurisdiction

of the Supreme Court to review this decision is conferred by Title 28, United States Code, sections 1253 and 2101(b).

The complaint in this case was filed by Negro children of public school age residing in School District No. 22, Clarendon County, South Carolina, and their respective parents and guardians, against the public school officials of said county and school district who, as officers of the State, maintain, operate and control the public schools for children residing in said district. It was alleged that defendants maintained certain public schools for the exclusive use of white children and certain other public schools for Negro children; that the schools for Negro children were in all respects inferior to the schools for white children; that the defendants excluded the infant plaintiffs from the white schools pursuant to Article XI, section 7, of the Constitution of South Carolina, and section 5377 of the Code of Laws of South Carolina of 1942, which require the segregation of the races in public schools; and that it was impossible for the infant plaintiffs to obtain a public school education equal to that afforded and available to white children as long as the defendants enforced these laws.

The complaint sought a judgment declaring the invalidity of these laws as a denial of the equal protection of the laws secured by the Fourteenth Amendment of the Constitution of the United States, and an injunction restraining the defendants from enforcing them and from making any distinction based upon race or color in the educational opportunities, facilities and advantages afforded public school children residing in said district.

Defendants in their answer joined issue on this question and admitted that in obedience to the constitutional and statutory mandates separate schools were provided for the children of the white and colored races; and that no child of either race was permitted to attend a school provided for

children of the other race. In the Third Defense of defendants' answer they alleged that the above constitutional and statutory provisions were a valid exercise of State's legislative power.

The jurisdiction of a three-judge District Court was invoked pursuant to Title 28, United States Code, sections 2281, 2284, for the purpose of determining the validity of the provisions of the Constitution and laws of South Carolina requiring segregation of the races in public schools. This issue was clearly raised, and was decided by upholding the validity of these provisions and by refusing to enjoin their enforcement.

The judgment in this case, one judge dissenting, stated that neither the constitutional nor statutory provisions requiring segregation in public schools were in violation of the Fourteenth Amendment and that plaintiffs were not entitled to an injunction against the enforcement of these provisions by these defendants. The judgment also stated that the educational facilities offered infant plaintiffs were unequal to those offered to white pupils[1] and ordered the defendants "to furnish to plaintiffs and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils."

The decree herein is the type of order which entitles the plaintiffs-appellants to a direct appeal to the Supreme Court within the meaning of Title 28, United States Code, sections 1253 and 2101(b). *Eichholz* v. *Public Service Commission*, 306 U. S. 268.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case: *Mc-*

[1] This was all admitted in open court by the defendants at the outset of the trial.

Laurin v. Board of Regents, 339 U. S. 637; *Wilson v. Board of Supervisors*, 340 U. S. 909.

Statement

At the opening of the trial, before a three-judge District Court as required by Title 28, United States Code, sections 2281 and 2284, defendants admitted upon the record that "the educational facilities, equipment, curricula and opportunities afforded in School District No. 22 for colored pupils * * * are not substantially equal to those afforded for white pupils." The defendants also stated that they did "not oppose an order finding that inequalities in respect to buildings, equipment, facilities, curricula, and other aspects of the schools provided for the white and colored children of School District No. 22 in Clarendon County now exist, and enjoining any discrimination in respect thereto."

These admissions were made part of the record being filed as an amendment to the answer. The only issue remaining to be tried was the question of the constitutionality of the laws requiring segregation of the races in public education as applied to the plaintiffs.

During the trial the plaintiffs produced testimony showing the extent of the physical inequality in the segregated schools of Clarendon County and especially School District No. 22. Over the objection of the plaintiffs[2] the defendants introduced testimony that a three per cent sales tax and authorization of a $75,000,000 bond issue for improvement of schools had recently been adopted by the State of South Carolina, and that the State Educational Finance

[2] On the grounds that equality within the meaning of the Fourteenth Amendment did not include contemplated future action.

Commission[3] to supervise the distribution of these funds had just been organized and had not even set up rules of procedures. About a week before the trial Clarendon County had "inquired" about making an application for funds.

The testimony of nine expert witnesses was introduced by plaintiffs: two experts in the field of education who offered a comparison of the public schools; one expert in educational psychology, three experts in the respective fields of child and social psychology, one expert in political science, one expert in school administration, and one expert in the field of anthropology.

The uncontroverted testimony of these witnesses demonstrated that the Negro schools in question were inferior in every material aspect to the white schools, and that similarly the caliber of education offered to Negro pupils was inferior to that offered to white pupils. The testimony of these witnesses also established the fact that the segregation of Negro pupils in these schools would *in and of itself* preclude an equality of education offered to white pupils or pupils in a non-segregated school. These witnesses not only established their qualifications in their respective fields but also supported their conclusions by objective and scientific authorities.

One of the experts in the field of child and social psychology testified that he had made special studies of the recognized methods of testing the effects of race and segregation on children. He used a test of this type on Negro school children including the infant plaintiffs in School District

[3] It was admitted that although the school population of South Carolina was approximately forty to forty-five per cent Negro there were no Negroes on the Commission and no Negro employees of the Commission.

No. 22 a few days before the trial. From his general experience in this field and the results of his tests he testified:

> "A. The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.
>
> "Q. Is that the type of injury which in your opinion would be enduring or lasting?
>
> "A. I think it is the kind of injury which would be as enduring or lasting as the situation endured, changing only in its form and in the way it manifests itself."

These witnesses testified as to the unreasonableness of segregation in public education and the lack of scientific support for such segregation and exclusion. They testified that all scientists agreed that there are no fundamental biological differences between white and Negro school pupils which would justify segregation. An expert in anthropology testified:

> "The conclusion, then to which I come, is differences in intellectual capacity or inability to learn have not been shown to exit as between Negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice."

Another expert witness testified:

> "It is my opinion that except in rare cases, a child who has for 10 or 12 years lived in a community where legal segregation is practiced, furthermore, in a community where other beliefs and attitudes support racial discrimination, it is my belief that such a child will

probably never recover from whatever harmful effect racial prejudice and discrimination can wreck."

The defendants did not produce a single expert to contradict these witnesses. There were only two witnesses for the defendants. The Superintendent of Schools for District No. 22 testified as to the reasons for the physical inequalities between the white and Negro schools. The Director of the Educational Finance Commission testified as to the proposed operation of the Commission and the possibility of the defendants obtaining funds to improve public schools. The latter witness testified that from his experience as a school administrator in Sumter and Columbia, South Carolina, it would be "unwise" to remove segregation in public schools in South Carolina. On cross-examination, he admitted he had not made any formal study of racial tensions but based his conclusion on the fact that he had "observed conditions and people in South Carolina" all of his life. He also admitted that his conclusion was based in part on the fact that all of his life he had believed in segregation of the races.

Constitution and Statute Involved

Article XI, section 7 of the Constitution of South Carolina provides:

> "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 5377 of the Code of Laws of South Carolina is as follows:

> "it shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

Questions Presented

1. Whether a State which undertakes to provide a public education for its citizens can satisfy the requirements of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States by providing a system of separate public elementary and high schools for Negroes and excluding all Negroes from the schools it provides for all other persons?

2. Whether the District Court erred in predicating its decision upon *Plessy* v. *Ferguson*, and in disregarding *McLaurin* v. *Board of Regents* and principles serving as the basis for this and other decisions of the Supreme Court in conflict with the rationale of the *Plessy* case?

Statement of the Grounds Upon Which It Is Contended the Questions Involved Are Substantial

Summary

The defendants having conceded the physical inequalities of the segregated schools, the only question remaining in the case was the validity of the laws requiring the segregation and exclusion of the infant plaintiffs from the only schools where they could obtain an education equal to that offered all other children. This was the only question which required the convening of the three-judge court.

The Supreme Court has always recognized the importance of racial segregation in public education. Although the Supreme Court has clarified the issue as to graduate and professional schools, the Court has never had the opportunity to consider the question as to elementary and high schools on the basis of a full and complete record with the issue clearly drawn and with competent expert testimony as appears in the record in this case. A clear cut decision on this issue will remove all doubts in the field of public education.

The majority opinion of the lower court subordinated the individual rights of the plaintiffs to the state's segregation policy. It was held that the Federal courts were powerless to interfere with the statutes of a state segregating Negroes in public education as long as equality of physical equipment was ordered.

The majority opinion held that the rationale of the decisions in *Sweatt* v. *Painter*, 339 U. S. 629 and *McLaurin* v. *Board of Regents*, 339 U. S. 637 could not be applied to elementary and high school pupils. Thus, without a review of this decision there will be considerable doubt in the minds of judges, school officials, taxpayers and pupils of the extent of the principles set forth in those decisions.

ARGUMENT

I

The Question Whether a State Which Undertakes to Provide a Public Education for Its Citizens Can Satisfy the Requirements of the Equal Protection Clause of the Fourteenth Amendment by Providing a System of Separate Public Elementary and High Schools for Negroes and Excluding All Negroes from the Schools It Provides for All Other Persons Is of Great Public Importance and Should Be Decided by the Supreme Court in This Case.

One of the firmly recognized and established functions of government is the education of its citizens. In the United States this function has been undertaken and is discharged by the individual states which have established and maintain public educational facilities from the elementary through the graduate and professional school levels, and require all citizens during the greater period of their minority to either attend the public schools or obtain an education privately.

Although this responsibility has been assumed by the states individually, the educational development of the youth of the Nation is nevertheless a matter of great national concern which becomes increasingly important. So also is the practice, current in a broad section of the country, of affording a dual system of schools and a double standard of public education based wholly upon the race or color of the pupils attending.

Racially segregated public schools are legally required in seventeen southern states[4] and the District of Columbia.[5] In all but a few of the remaining thirty-one states, segregated schools are either unauthorized or are prohibited.[6]

A

The Supreme Court has recognized the importance of the issue of racial segregation in the area of public education in cases involving educational opportunities at the

[4] ALA. CONST., Art. XIV, sec. 256; ALA. CODE (1940), Title 52, sec. 93; ARK. STAT. ANN. (1947), sec. 80-509; DEL. CONST., Art. X, sec. 2; DEL. REV. CODE (1935), Ch. 71, Art. 1, sec. 2631, Art. V, sec. 2684; FLA. CONST., Art. 12, sec. 12; FLA. STAT. ANN., sec. 228.09, 230.23; GA. CONST., Art. VIII, sec. 1; GA. CODE ANN. (1947 Cum. Supp.) sec. 32-909, 32-977; KY. CONST., sec. 187; KY. REV. STAT. (1948), sec. 158.020; LA. CONST. ANN. (Dart 1947 Supp.), Art. 12, sec. 1; MD. CODE ANN. (1939), Art. 77, sec. 111, 192 to 193; MISS. CONST., Art. 8, sec. 207; MISS. CODE ANN. (1942) sec. 6276; MO. CONST., Art. IX, sec. 1; MO. REV. STAT. (1939) sec. 10349, 10488; N. C. CONST., Art. IX, sec. 2; N. C. GEN. STAT. (1943), sec. 115-2, 115-3, 115-30, 115-66, 115-97; OKL. CONST., Art. XIII, sec. 3; OKL. STAT. (Supp. 1949), Title 70, sec. 5-1 to 5-15; S. C. CONST., Art. 11, sec. 7; S. C. CODE (1942), sec. 5377; TENN. CONST., Art. 11, sec. 12; TENN. CODE ANN. (Williams 1934) sec. 2377, 2393.9, 11395 to 11397; TEX. CONST., Art. VII, sec. 7; TEX. ANN. CIV. STAT. (Vernon 1947), Art. 2755, 2900, 2719, 2819; VA. CONST. Art. IX, sec. 140; VA. CODE (1950), sec. 22-221; W. VA. CONST., Art. XII, sec. 8; W. VA. CODE ANN. (1943), sec. 1775, 1777.

[5] D. C. CODE (1940), Title 31, Sec. 1110 to 1113.

[6] Reddick, L. D., *The Education of Negroes in States Where Separate Schools Are Not Legal*, The Journal of Negro Education, Summer 1947, Vol. XVI, No. 3, p. 296.

graduate and professional school levels.[7] The same basic questions arising at the elementary and secondary levels are no less important. In fact, the elementary and secondary schools and racial segregation obtaining in them, exert a far greater effect on a far larger number of persons at a far more important stage of the person's life.

This case and *Carr* v. *Corning*, 182 F. (2d) 14 (D. C.), are the only two cases decided in several decades in which a direct attack was made upon the constitutional validity of racial segregation in public education at the elementary and secondary school levels. The importance of the issues here presented is emphasized by the fact that each of these two cases was decided by a Federal Court and in each the validity of such segregation was sustained by the bare majority of a single vote.

The course of decision taken by the Supreme Court in recent cases involving segregated public education at the professional and graduate school levels,[8] the strong dissents registered in this case[9] and in *Carr* v. *Corning*,[10] the Supreme Court's refusal in *Sweatt* v. *Painter*[11] to reaffirm the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, and the weakening and disappearance of that doctrine in other areas, combine to create serious and widespread question as to the legality and the duration of segregated public elemen-

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[7] *Wilson* v. *Board of Supervisors*, 340 U. S. 909, and *McLaurin* v. *Board of Regents*, 339 U. S. 637, were reviewed on direct appeal. *Sweatt* v. *Painter*, 339 U. S. 629, was reviewed on certiorari. Cf. *Sipuel* v. *Board of Regents*, 332 U. S. 631, and *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337.

[8] *Wilson* v. *Board of Supervisors*, 307 U. S. 909; *McLaurin* v. *Board of Regents*, 339 U. S. 637; *Sweatt* v. *Painter*, 339 U. S. 629. Cf. *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337.

[9] Appendix A.

[10] 182 F. (2d) at 22-35.

[11] 339 U. S. at 335-336.

tary and high schools. This doubt the Supreme Court should settle by a definitive decision as to whether racial separation in public elementary and secondary schools is a constitutionally permissible pattern which may serve to guide the future endeavors of scholars and school officials.[12]

B.

Approximately 10,000,000 Negroes, or 77% of all Negroes in the United States, live in the southern region where a pattern of educational segregation is sanctioned and enforced by law. Admittedly, this is the poorest section of the country. This condition is overwhelmingly due to the maintenance of segregation and a caste system which relegates all Negroes to a position lower than the lowest white. This is the area of the country least able to afford either the financial or the educational hazards created by a dual system of education. As a result, Negroes have been victimized throughout the years by grossly discriminatory practices designed to conserve for whites the maximum possible benefit of educational resources. The courts in this area have been faced with a variety of litigation as to the constitutional validity of such segregation, the definition and determination of the segregated group, the apportionment of public funds between the separated school systems, the provision of facilities, curricula and teachers, and the numerous other complex problems which such segregation has created.[13] After more than three-quarters of

[12] 8 Wash. and Lee L. Rev. 54 (1951); 13 Ga. Bar. J. 357 (1951); 4 Van. L. Rev. 555 (1951); 24 Temple L. Q. 222 (1950); 3 U. Fla. L. Rev. 358 (1950); 13 Ga. Bar J. 88 (1950); 36 Va. L. Rev. 797 (1950); 3 So. Car. L. Q. 71 (1950); 30 B. U. L. Rev. 565 (1950); 1950 Washington U. L. Q. 594 (1950); 24 So. Cal. L. Rev. 74 (1950); 17 Brooklyn L. Rev. 134 (1950); 30 Neb. L. Rev. 69 (1950); 5 Miami L. Rev. 150 (1950); 39 Ga. L. J. 145 (1950); 26 Notre Dame Law. 81 (1950); 26 Notre Dame Law. 134 (1950); 3 Ala. L. Rev. 181 (1950).

[13] See the cases collected in Appendix B.

a century of judicial effort to attain an equality of educational opportunity within the framework of racial segregation, the widespread inequalities and discriminations yet existent demonstrate the futility of such a course.

During the 1944-45 school session, the value of elementary school property in eight southern states [14] was $867,960,280. Of this sum, $786,662,302 was invested in schools for 3,510,540 white children and $81,297,978 in schools for 1,551,279 Negro children. The per capita value of school property was $224.08 for white pupils and $52.40 for Negro pupils. The investment for white pupils was 427.6% more than the investment for Negro pupils.[15] For the same school session, the average current expenditure in seven southern states [16] was $73.67 per white pupil enrolled and $32.46 per Negro pupil enrolled. The average expenditure per white pupil was 227% greater than the average expenditure per Negro pupil.[17]

For the 1943-44 school session, ten southern states [18] spent $43,448,777 for public school transportation, of which only $1,349,834, or 3.1% was spent for Negro pupils. The expenditure was $6.11 per white pupil and only $0.59 per Negro pupil.[19] For the 1944-45 school session, the average salary paid white teachers in the seventeen southern states and the District of Columbia was $1,513, and the average paid

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[14] The eight states: Alabama, Florida, Georgia, Maryland, Mississippi, North Carolina, South Carolina and Texas.

[15] Washington, *Availability of Education for Negroes in the Elementary School*, The Journal of Negro Education, Howard University Press, Summer Issue, Vol. XVI, 1947, p. 446.

[16] The seven states: Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, and South Carolina.

[17] Washington, op. cit. *supra* note 15, at 447.

[18] The ten states: Alabama, Arkansas, Florida, Georgia, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina and Texas.

[19] *Statistics of State School Systems, 1943-44*, Department of Education, Government Printing Office, passim.

Negro teachers was $1,187.28, a differential of $326.29. The average salary paid white teachers was 127.5% greater than the average salary paid Negro teachers.[20]

Other consequences of public school segregation are similarly manifested:[21]

> "In the 17 states and the District of Columbia where separate schools are maintained by law, some 494,207 (2.8%) of the native whites, and 569,378 (11.7%) of the Negroes in this age group had not attended school for even one year; and 2,078,998 (11.6%) of the native whites and 1,802,770 (37.0%) of the Negroes were functional illiterates. In other words, there were four times as many Negroes as native whites in proportion to population who had not had at least a year of schooling; and three times as many Negroes who were functional illiterates.
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> . . . . . .
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> "In the 17 states and the District of Columbia the median years of schooling for the white population was 8.4; for Negroes the median was 5.1; with a range for the whites running from 7.9 in Kentucky to 12.1 in the District of Columbia; and for Negroes from 3.9 in Louisiana to 7.6 in the District of Columbia. Some 13.2 per cent of the white population had completed four years of high school as compared with only 2.9 per cent of the Negroes; 12.1 per cent of the whites had had some college education, as compared with only 2.5 per cent of the Negroes; and 4.7 per cent of the white population had had four or more years of college as contrasted with only 1.1 per cent of the Negroes. There were, therefore, four times as many whites as Negroes with a high school or college edu-

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[20] *Statistics of State School Systems, 1943-1944*, Department of Education, Government Printing Office, passim; "The Journal of Negro Education, Howard University Press, Vol. XVI, Summer 1947, passim.

[21] Thompson, *The Availability of Education in the Negro Separate School*, The Journal of Negro Education, Howard University Press, Vol. XIV, Summer 1947, p. 264.

cation in these states which require racial segregation by law."

Though in much smaller degree, whites as well as Negroes suffer from lowered educational standards. As it has been authoritatively reported.[22]

> "Segregation lessens the quality of education for the whites as well. To maintain two school systems side by side—duplicating even inadequately the buildings, equipment, and teaching personnel—means that neither can be of the quality that would be possible if all the available resources were devoted to one system, especially when the States least able financially to support an adequate educational program for their youth are the very ones that are trying to carry a double load."

The adverse effects of racial segregation in public education are not confined to the minority group or to the local community. The whole nation suffers from the underdevelopment of a vast segment of its human resources. In the most critical period of June-July, 1943, when the nation was crying for manpower, 34.5% of the rejections of Negroes from the armed forces were for educational deficiency. Only 8% of the white selectees rejected for military service failed to meet the educational standards.[23] The official War Department report on the utilization of Negro manpower in the postwar Army says that "in the placement of men who were accepted, the Army encountered considerable difficulty. Leadership qualities had not been developed among the Negroes, due principally to environment and

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[22] *Higher Education for American Democracy*, Report of the President's Commission on Higher Education, Government Printing Office, Washington, D. C., 1947, Vol. I, p. 34.

[23] *The Black and White of Rejections for Military Service*, Montgomery, Ala., American Teachers Association, 1944, p. 5.

lack of opportunity. These factors had also affected development in the various skills and crafts." [24]

C

The record in this case incontrovertibly demonstrates that the segregated school irreparably harms the pupil. Unlike many forms of racial segregation, where the citizen may by exercise of his own will either encounter or avoid the situations of which segregation is a part, he has little freedom of choice in this area. The legal alternatives to a public school education usually being economically unavailable, he is forced by compulsory school attendance laws to go to the segregated schools and there be subjected to the evils which segregation invariably produces.

State ordained segregation is a particularly invidious policy which needlessly penalizes Negroes, demoralizes whites and tends to disrupt our democratic institutions.

Segregation prevents both the Negro and white pupil from obtaining a full knowledge and understanding of the group from which he is separated. It has been scientifically established that no child at birth possesses either an instinct or even a propensity toward feelings of prejudice or superiority. These prejudices, when and if they do appear, are but reflections of the attitudes and institutional ideas evidenced by the adults about him.[25] The very act of segregation tends to crystallize and perpetuate group isolation, and therefore serves as a breeding ground for unhealthy attitudes.[26]

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[24] Report of Board of Officers on Utilization of Negro Manpower in the Post-War Army (February, 1946), p. 2.

[25] Park, *The Basis of Prejudice*, The American Negro, the Annals, Vol. 140, pages 11-20 as cited by Frazier, *The Negro in the United States* (1949), at 668; Faris, *The Nature of Human Nature*, 354, chapter on *The Natural History of Race Prejudice* (1937).

[26] Laster, *Race Attitudes in Children*, 48 (1949); Ware, *The Role of the Schools in Education for Racial Understanding*, 13, The Journal of

A feeling of distrust for the minority group is fostered in the community at large—a psychological atmosphere which is most unfavorable to the acquisition of a proper education. This atmosphere, in turn, tends to accentuate imagined differences between Negroes and whites.[27]

Qualified educators, social scientists, and other experts have expressed their realization of the fact that "separate" is irreconcilable with "equality."[28] There can be no equality since the very fact of segregation establishes a feeling of humiliation and deprivation to the group considered inferior.[29]

Probably the most irrevocable and deleterious effect of segregation upon the minority group is that it imposes a badge of inferior status upon the segregated group.[30] This

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Negro Education (1944); Moten, *What the Negro Thinks* (1929); Long, *Psychogenic Hazards of Segregated Education of Negroes*, 4 The Journal of Negro Education, 343 (1935). For an exhaustive study relating to the reaction, of Negroes to discrimination and how their reactions affect their relations with whites, see Rose, *The Negro's Morale: Group Identification and Protest* (1949); Johnson, *Patterns of Segregation, II, Behavior Response of Negroes to Segregation and Discrimination* (1943).

[27] Murdal, *An American Dilemma*, 625 (1944); "But they are isolated from the main body of whites, and mutual ignorance helps reinforce segregative attitudes and other forms of race prejudice."

[28] Id. at page 580; Johnson, op. cit. *supra* note 26, at 4, 318; Mangum, *The Legal Status of the Negro* (1947); Report of the President's Committee on Civil Rights, *To Secure These Rights* (1947); Report of the President's Commission on Higher Education, *Higher Education for American Democracy*, (1947); Deucher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Opinion*, 26 Journal of Psychology 259-287 (1948).

[29] McWilliams, *Race Discrimination and the Law*, 9 Science and Society No. 1 (1945); 56 Yale L. J. 1051, 1052, 1059 (1947); Bond, Education, *Education of the Negro in the American Social Order*, 385 (1934); Moton, op. cit. *supra* note 26, at 99; Bunche, *Education in Black and White*, 5 Journal of Negro Education 351 (1936); Long, op. cit. *supra* note 26, at 336-343; Henrich, *The Psychology of Suppressed People*, 52 (1937); Dollard, *Caste and Color in a Southern Town*, 269 441 (1937); Young, *America's Minority Peoples*, 585 (1932).

[30] Smythe, *The Concept of "Jim Crow,"* 27 Social Forces 48 (1948): "'Jim Crow' as used in a sociological context thus indicates for a specific

badge of inferior status is recognized not only by the minority group, but by society at large.[31] A definitive study of the scientific works of contemporary sociologists, historians and anthropologists conclusively documents the proposition that the intent and result of segregation are the establishment of an inferiority status. And a necessary corollary to the establishment of this value-judgment is the deprivation suffered by both the minority and majority groups.[32]

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social group the Negro's awareness of his badge of inequality which he learns through the operation of a 'Jim Crow' concept in his every day living. This pattern of existence has become so much a part of the nation's social structure that it has become synonymous with the words 'segregation' and 'discrimination' and at times when 'Jim Crow' is indexed some authors have indexed it as a cross reference for these terms."

[31] Myrdal, op. cit. *supra* note 27, at 643. "Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers. Throughout this book we have been forced to notice the low economic, political, legal and moral standards of Southern whites—kept low because of discrimination against Negroes and because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain 'superior' to the held-down Negroes * * * "

[32] Baruch, *Glass House of Prejudice*, 66-76 (1946); Gallagher, *American Caste and the Negro College* 94 (1938); Wherever possible, the caste line is to keep *all* Negroes below the level of the lowest whites. This is the first and deepest meaning of "separate but equal". Page 105: "Not the least important aspect of the caste system is its results in seriously malconditioning the individuals whose psychological growth is strongly affected by a caste divided society. These influences are not limited to the Negro caste. They stamp themselves upon the dominant caste as well"; La Farge, *The Race Question and the Negro* 159 (1945): "Segregation, as a compulsory measure based on race, imputes essential inferiority to the segregated group. Segregation, since it creates a ghetto, brings in the majority of instances, for the segregated group, a diminished degree of participation in those matters which are ordinary human rights, such as proper housing, educational facilities, police protection, legal justice, employment, * * *. Hence it works objective injustice. So normal is the result for the individual that the result is rightly termed inevitable for the group at large"; James, *The Philos-*

D

The unanimous conclusion of scholars and students who have studied the problem is that racial segregation in public education must be eliminated.

Recognizing that segregation constitutes a menace to American freedom and is indefensible, the President's Committee on Civil Rights unequivocally recommended its elimination from American life:[33]

> "The separate but equal doctrine has failed in three important respects. First, it is inconsistent with the fundamental equalitarianism of the American way of life in that it marks groups with the brand of inferior status. Secondly, where it has been followed, the results have been separate and unequal facilities for minority peoples. Finally, it has kept people apart despite incontrovertible evidence that an environment favorable to civil rights is fostered whenever groups are permitted to live and work together."

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aphy of William James 128 (1925); "Properly speaking, *a man has as many social selves as there are individuals who recognize him* and carry an image of him in their mind. To wound any one of these images is to wound him"; Loescher, *The Protestant Church and the Negro* (1948); "(Segregation) is, in itself, an implication of inferiority, an inferiority not only of status but of essence, of being"; Thompson, "Mis-Education for Americans"; 36 Survey Graphic 119 (1947): "Education for segregation, if it is to be effective must perpetuate beliefs which define the Negro's status as inferior, which emphasize superficial differences, or which in any way suggest that the Negro is a lower order of being and therefore should not be expected to be treated like a white person." Page 120: "Mis-education for segregation has deleterious effects on both Negroes and whites. It requires mental and emotional gymnastics on both sides to adjust (or attempt to adjust) to the many logical and ethical contradictions of segregation. The situation is crippling to the personalities of both Negro and white Americans."

[33] Report of the President's Commission on Civil Rights, *To Secure These Rights*, U. S. Government Printing Office, 1947, p. 166.

Likewise, the President's Commission on Higher Education, in its report on education in the United States, said:[34]

> "The time has come to make public education at all levels equally accessible to all, without regard to race, creed, sex or national origin."

II

Statutory Classifications Based Solely on Race or Color Violate the Federal Constitution

A

Race or Color Cannot Be Made the Basis of a Statutory Classification

In South Carolina, the school in District No. 22 which a child is permitted to attend depends solely upon his race or color. The Supreme Court, in recent decisions, has indicated that statutes which affect individuals according to their race or ancestry are, in the absence of an overwhelming public necessity, invalid. *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410; *Korematsu* v. *United States*, 323 U. S. 214; and *Hirabayashi* v. *United States*, 320 U. S. 81, wherein the Court said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification . . . based on race alone has often been held to be a denial of equal protection." (p. 100)

In *Nixon* v. *Herndon*, 273 U. S. 536, Mr. Justice Holmes

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[34] Report of the President's Commission on Higher Education, *Higher Education for American Democracy*, U. S. Government Printing Office, 1947, p. 38.

stated for the Court that statutory classifications can never be based on color:

> "States may do a great deal of classifying that it is difficult to believe rational, but there are limits, and it is . . . clear . . . that color cannot be made the basis of a statutory classification." (p. 541)

The above decisions have been made without regard to the equal protection clause of the Fourteenth Amendment, thus indicating that the citizen's right to have his rights, obligations, and duties to the state determined without regard to his race or color is a fundamental right essential to our democratic society.[35] State statutes must in addition

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[35] It might be argued by the proponents of segregated school systems that since seventeen states have laws which regulate the use of some or all of the public educational facilities on the basis of race or color, the problem is essentially one for the legislative judgment and that federal courts should not interfere. The proponents might attempt to place reliance on the Supreme Court's examination on several occasions of the practices and experiences of the forty-eight states and other jurisdictions which have adopted Anglo-American jurisprudence, to see whether a right being claimed as fundamental is generally protected by the states. See for example, *Adamson* v. *California*, 332 U. S. 46; *In Re Oliver*, 333 U. S. 257. But such examination in the instant case is not at all relevant, and, in any event, if made, would have to exclude those states which have a history of unequal treatment to Negroes in educational facilities, political franchise, and other opportunities and rights normally available to citizens of a state.

In the first place, the Court has already indicated that governmental classifications based upon race and color are arbitrary and a denial of due process of law. *Korematsu* v. *United States*, 323 U. S. 214; *Ex Parte Endo*, 323 U. S. 282. These cases were under due process clause of the Fifth Amendment, but certainly "it ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth." *Adamson* v. *California*, supra, at 59.

Secondly, the plaintiff claims protection under the equal protection clause of the Fourteenth Amendment and, as indicated above, the intention of this clause was to afford the same rights to Negroes as were afforded to whites by a state.

Finally, the experiences in the southern states in determining whether the right to be free of laws imposing burdens or denying privileges based

meet the standards of the equal protection clause of the Fourteenth Amendment. An examination of the relevant data, including the legislative history, supports plaintiffs' contention that the purpose of the framers of the Fourteenth Amendment in including therein the equal protection clause was to require state action affecting Negroes to be measured by whether white persons were being afforded the same right, privilege or advantage which the state was denying to Negroes. In other words, if a particular state affords to its white citizens a particular right or privilege, the equal protection clause requires that the same right be

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upon race or ancestry is fundamental to a free society, must be discounted in determining the meaning of the Fourteenth Amendment. In the first place, those states which have traditions and practices similar to South Carolina in enforcing racial discrimination refused, in 1866 and 1867, to ratify the Fourteenth Amendment. Therefore, their practice and conduct thereunder is not valid evidence as to the meaning or scope of the Amendment which they have consistently opposed. See Fairman & Morrison, *Does The Fourteenth Amendment Incorporate The Bill of Rights?* 2 Stanford L. Rev. 5, 90-95 (1949) South Carolina has had a long history, culminating in the events which led to the decision in *Rice* v. *Elmore*, 165 F. (2d) 387 (CCA 4 1947), cert. denied 333 U. S. 875, in denying to its Negro citizens the right to exercise effectively their voting rights specifically guaranteed by the Fifteenth Amendment. The basis of the argument that matters are within the legislative judgment and therefore if a person wishes to change a particular legislation his arguments embodying economic, psychological and social data should be addressed to the legislature rather than to the Court necessarily presupposes that the legislature is subject to the popular will by use of the ballot. In a state such as South Carolina, this right has not been, and presently is not, freely available to Negroes, since state officials for many years have attempted to use various means, most of them already declared illegal by the Supreme Court, to prevent the free exercise of the ballot. Moreover, the only way that a group is able to persuade other groups that laws affect them unjustly or are injurious to the whole society is through discussion with the other groups. But racial segregation laws usually create conditions which tend to prevent the normal processes essential to free and democratic associations from operating and therefore those processes that ordinarily might be relied upon to protect individuals against arbitrary and unreasonable governmental action are absent. See *United States* v. *Carolene Products*, 304 U. S. 144, footnote 4.

granted to Negro citizens on the same basis. See Fairman & Morrison, *Does The Fourteenth Amendment Incorporate The Bill of Rights?* 2 Stanford L. Rev. 5, 138-139 (1949). Thus, even if there is a rational basis for the racial classification used by South Carolina to determine whether children should go to one school or another in District No. 22, the statute is necessarily unconstitutional.

B

There Is No Reasonable Basis for Allocating Educational Facilities on the Basis of Race

The South Carolina statute prohibiting Negro children from attending the schools set aside for white children has no rational basis, and in fact has injurious effects and prevents the accomplishments of the very end of public education. Even when dealing with legislation involving economic matters, where the Court has permitted certain classifications resulting in distinctions and burdens on one group and benefits to another, the Court has demanded that there be some cognate relationship between the classification and the end sought to be accomplished, and where the differences are not reasonably perceptible, or are irrelevant to the legislative end, the classifications, even in economic matters, have been held to violate the equal protection clause. *Quaker City Cab Co.* v. *Penn.*, 277 U. S. 389; *Southern Railroad Co.* v. *Green*, 216 U. S. 400; *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266. Where the legislation attempts to regulate personal rights, the test applied by the Court has been more stringent. See *Truax* v. *Raich*, 229 U. S. 33; *Skinner* v. *Oklahoma*, 316 U. S. 735.

The South Carolina segregation statute is invalid even under the more lenient standard, since there is no reasonable connection between race and the educational aims

sought to be achieved by a state in providing public education. The purpose of public education is to bring about a more intelligent citizenry and to develop individuals for democratic living. Laws which attempt to divide groups for public school purposes, according to race, religion or ancestry are at odds with the democratic ideals to which this nation is committed.

> "The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny. In no activity of the State is it more vital to keep out diversive forces than in the schools. . . ." Mr. Justice Frankfurter concurring in *McCollum* v. *Board of Education*, 332 U. S. 203, 212, 231.

Moreover, there is testimony in the record, not controverted by South Carolina, that the effect of a segregated school system is to make the white children feel superior and the Negro children feel inferior. The rigid pattern of segregation also prevents the voluntary association fostering intellectual commingling of people, which the Court has held is a constitutional right. In *McLaurin* v. *State Board of Regents*, 339 U. S. 637, speaking for a unanimous court, Mr. Chief Justice Vinson stated:

> "There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar."

South Carolina did not and cannot defend its legislation on the basis that race somehow affected the ability to receive education, or to achieve any of the ends of education. Indeed, the plaintiffs introduced evidence to show that race and color of skin were completely irrelevant. The evidence is in accordance with all the scientific investigations on the subject. Rose, *America Divided: Minority*

Group Relations in the United States (1948); Montague, *Man's Most Dangerous Myth—The Fallacy of Race*, 188 (1945); American Teachers Association, *The Black & White of Rejections for Military Service* 5 (1944) at 29; Klineberg, *Negro Intelligence and Selective Migration* (1935); Peterson & Lanier, *Studies in the Comparative Abilities of Whites and Negroes*, Mental Measurement Monograph (1929); Clark, *Negro Children*, Educational Research Bulletin (1923); Klineberg, *Race Differences*, 343 (1935).

C

Segregation Statutes Cannot Be Upheld on the Basis That They Are Necessary to Preserve Public Peace and Order

The court below attempted to justify the South Carolina segregated school system on the basis that otherwise there might be breaches of public order and that the segregated pattern had been existing in South Carolina for over one hundred years. The fact that for one hundred years or more constitutional rights of a large part of the citizens of South Carolina have been violated is no basis for defending the continuance of the violation. It has been repeatedly held by the Supreme Court that the other reason offered by the lower court—preservation of public order—does not afford a justification for the application of segregation statutes. In *Buchanan* v. *Warley*, 245 U. S. 60, the State of Kentucky attempted to define the ordinance segregating whites and Negroes into separate racial areas on the ground that otherwise riots and disorder might result. The Supreme Court summarily dismissed such an argument with this statement:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts.

> Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." (p. 81)

The Supreme Court recently reaffirmed the principle that the preservation of public peace and good order does not suffice to clothe with constitutionality government action which results in classification based upon race. *Shelley* v. *Kraemer*, 334 U. S. 1.

III

The Majority of the Lower Court Erred in Refusing to Follow the Applicable Decisions of the Supreme Court

Judicial expositions sustaining the constitutional validity of the "separate but equal" theory of public education rest principally upon the decision of the Supreme Court in *Plessy* v. *Ferguson*, 163 U. S. 537, and cases which without critical analysis have applied its doctrine in the area of public education.

In *Plessy* v. *Ferguson, supra*, the majority of the Supreme Court held that the application to an intrastate passenger of a Louisiana statute requiring the segregation of white and Negro passengers did not violate the Fourteenth Amendment. The case was decided upon pleadings which assumed the possibility of attainment of a theoretical equality within the framework of racial segregation rather than on a full hearing and evidence which would have established the inevitability of discrimination under a system of segregation. The majority opinion discussed and relied on *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 158, which was decided almost twenty years before the adoption of the Fourteenth Amendment. This Amendment was designed and intended to settle the very diversity of opinion,—so pronounced in 1849 when the *Roberts* case, *supra*, was

decided—as to the reasonableness of legal distinctions based on race or color. The famous dissenting opinion of Mr. Justice Harlan in the *Plessy* case, *supra*, stood as a challenge to the majority conclusion even when its position in the law seemed firmly secure, and time and experience have demonstrated the falsity of the antebellum justifications urged in the *Roberts* case, *supra*, and of the bases suggested by the majority of the Court in the *Plessy* case, *supra*.

In neither of the two decisions of the Supreme Court relating to racial segregation in public elementary or high schools has the holding in *Plessy* v. *Ferguson*, *supra*, been reexamined or seriously challenged. In *Cummings* v. *Board of Education*, 175 U. S. 528, suit was brought principally to obtain an injunction against continued operation of a white high school on the ground that no school was being operated for Negroes similarly situated. The Court's decision established the impropriety of the remedy invoked and denied the relief sought. The validity of segregation was not in issue; plaintiffs not only did not raise such issue, but acquiesced in the use of taxes levied to support segregated schools at the elementary and intermediate grammar school levels. In *Gong Lum* v. *Rice*, 275 U. S. 78, the plaintiff, a child of Chinese descent, asserted a right not to be classified for school purposes as a colored person and required to attend the Negro school. The validity of racial segregation in the public schools there involved was not raised by the plaintiff who, rather, affirmed its validity and insisted upon being classified as white and admitted to a white school.[36]

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[36] It is true that Mr. Chief Justice Taft, in discussing the issue, said: "Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the State Legislature to settle without intervention of the Federal Courts under the Federal Constitution." (275 U.S. at 85) Therefore, even if this

The decisions of the Supreme Court in the area of graduate and professional education have not supported the doctrine of the *Plessy* case, *supra*. In *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337, the only question involved was whether a qualified Negro applicant could be excluded from the only state-supported law school and exiled to another state to receive a legal education. In holding in the negative, the Court, while repeating the doctrine of *Plessy* v. *Ferguson*, *supra*, neither examined nor applied it. In *Sipuel* v. *Board of Regents*, *supra*, where the Court held that a Negro applicant was entitled to receive a legal education within the state as soon as it was afforded to applicants of any other group, the doctrine of *Plessy* v. *Ferguson*, *supra*, was neither raised, examined, repeated nor applied. In *Fisher* v. *Hurst*, 333 U. S. 147, the same case, *supra*, the Court denied an original writ of mandamus to compel compliance with its mandate by admission to the state's law school on the grounds that the original *Sipuel* case had specifically not raised the issue of the validity of the segregation statutes and that procedurally the question could not be considered on the petition for writ of mandamus.

The majority opinion of the District Court in this case upheld the validity of the provisions of the Constitution and Laws of South Carolina requiring segregation of the races on the following grounds: (1) segregation of the races in public schools "so long as equality of rights is preserved is a matter of legislative policy for the several states, *with which the federal* courts are powerless to interfere." (italics ours); (2) subject to the observance of the fundamental rights and liberties guaranteed by the Federal Constitution, each state is free to determine how it shall exer-

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decision is construed as raising the issue of the validity of school segregation statutes, it is clear that the doctrine was not examined and that *Plessy* v. *Ferguson*, *supra*, was relied upon without question.

cise its police power, i.e., the power to legislate with respect to the safety, morale, health and general welfare; (3) the decisions in *Plessy* v. *Ferguson, supra, Cummings* v. *Board of Education, supra,* and *Gong Lum* v. *Rice, supra,* held that as long as equality is furnished, segregation of the races in public schools is not unconstitutional and these cases are controlling in the instant case; (4) that neither *Sweatt* v. *Painter,* 339 U. S. 629, *McLaurin* v. *Oklahoma State Regents, supra,* nor *McKissick* v. *Carmichael,* 187 F. 2d 949, can be applied to this case because the *Sweatt* case, *supra,* did not overrule *Plessy* v. *Ferguson, supra,* and both the *Sweatt* case, *supra,* and the *McKissick* case, *supra,* were decided on the question of equality, and the *McLaurin* case, *supra,* "involved humiliating and embarrassing treatment of a Negro graduate student to which no one should have been required to submit. Nothing of the sort is involved here"; (5) there is a difference between education on the graduate level and on lower levels of education.

The majority opinion held that the *Sweatt* case, *supra,* did not apply to this case because the decision in the *Sweatt* case, *supra,* was based upon the inequality of the "educational facilities" offered the white and Negro law students. The opinion also held that: "*McLaurin* v. *Oklahoma State Regents* involved humiliating and embarrassing treatment of a Negro graduate student to which no one should have been required to submit. Nothing of the sort is involved here." To the contrary, the record in this case shows that the injury to the plaintiffs in this case was not only humiliating and embarrassing but was even more harmful than in graduate education. The uncontradicted testimony in this record brings this case clearly within the rationale of the *McLaurin* case, *supra.*

Dr. Kenneth Clark, an expert in the fields of social and

child psychology who tested the infant plaintiffs and other Negro school children in District No. 22, testified:

"A. The conclusion which I was forced to reach was that these children in Clarendon County, like other human beings who are subjected to an obviously inferior status in the society in which they live, have been definitely harmed in the development of their personalities; that the signs of instability in their personalities are clear, and I think that every psychologist would accept and interpret these signs as such.

"Q. Is that the type of injury which in your opinion would be enduring or lasting?

"A. I think it is the kind of injury which would be as enduring or lasting as the situation endured, changing only in its form and in the way it manifests itself."

Dr. David Krech, another psychologist, testified:

". . . Legal segregation, because it is legal, because it is obvious to everyone, gives what we call in our lingo environmental support for the belief that Negroes are in some way different from and inferior to white people, and that in turn, of course, supports and strengthens beliefs of racial differences, of racial inferiority. I would say that legal segregation is both an effect, a consequence of racial prejudice, and in turn a cause of continued racial prejudice, and insofar as racial prejudice has these harmful effects on the personality of the individuals, on his ability to earn a livelihood, even on his ability to receive adequate medical attention, I look at legal segregation as an extremely important contributing factor. May I add one more point. Legal segregation of the educational system starts this process of differentiating the Negro from the white at a most crucial age. Children, when they are beginning to form their views of the world, beginning to form their perceptions of people, at the very crucial age they are immediately put into the situation which demands of them, legally, practically, that they see Negroes as somehow of a different group, different

being, than whites. For these reasons and many others, I base my statement.

"Q. These injuries that you say come from legal segregation, does the child grow out of them? Do you think they will be enduring, or is it merely a sort of temporary thing that he can shake off?

"A. It is my opinion that except in rare cases, a child who has for 10 or 12 years lived in a community where legal segregation is practiced, furthermore, in a community where other beliefs and attitudes support racial discrimination, it is my belief that such a child will probably never recover from whatever harmful effect racial prejudice and discrimination can wreck."

Dr. Harold McNalley, an expert in the field of Educational Psychology, testified:

". . . And, secondly, that there is basically implied in the separation—the two groups in this case of Negro and White—that there is some difference in the two groups which does not make it feasible for them to be educated together, which I would hold to be untrue. Furthermore, by separating the two groups, there is implied a stigma on at least one of them. And, I think that that would probably be pretty generally conceded. We thereby relegate one group to the status of more or less second-class citizens. Now, it seems to me that if that is true—and I believe it is—that it would be impossible to provide equal facilities as long as one legally accepts them.

"Q. I see. Now, all of the items that you talked about that you based your reason for reaching your conclusion, you consider them to be important phases in the educational process?

"A. Very much so."

Dr. Louis Kesselman, a political scientist, testified:

"I think that I do. My particular interest in the field of Political Science is citizenship and the Political processes. And, based upon studies which we

regard as being scientifically accurate by virtue of use of the scientific methods, we have come to feel that a number of things result from segregation which are not desirable from the standpoint of good citizenship; that the segregation of white and Negro students in the schools prevents them from gaining an understanding of the needs and interests of both groups. Secondly, segregation breeds suspicion and distrust in the absence of a knowledge of the other group. And, thirdly, where segregation is enforced by law, it may even breed distrust to the point of conflict. Now, carrying that over into the field of citizenship, when a community is faced with problems which every community would be faced with, it will need the combined efforts of all citizens to solve those problems. Where segregation exists as a pattern in education, it makes that cooperation more difficult. Next, in terms of voting and participating in the electorial process, our various studies indicate that these people who are low in literacy and low in experience with other groups are not likely to participate as fully as those who have . . ."

Mrs. Helen Trager, a child psychologist who had conducted tests of the effects of racial segregation and racial tensions among children, testified:

"Q. Mrs. Trager, in your opinion, could these injuries under any circumstances ever be corrected in a segregated school?

"A. I think not, for the same reasons that Dr. Krech gave. Segregation is a symbol of, a perpetuator of, prejudice. It also stigmatizes children who are forced to go there. The forced separation has an effect on personality and one's evaluation of one's self, which is inter-related to one's evaluation of one's group."

Dr. Robert Redfield, an expert in the field of anthropology, testified as to the unreasonableness of racial classification in education:

> "Q. As a result of your studies that you have made, the training that you have had in your specialized field over some 20 years, given a similar learning situation, what, if any differences, is there between the accomplishment of a white and a negro student, given a similar learning situation?
>
> "A. I understand, if I may say so, a similar learning situation to include a similar degree of preparation?
>
> "Q. Yes.
>
> "A. Then I would say that my conclusion is that the one does as well as the other on the average."

The opinion and decree of the majority of the lower court was based upon the assumption that equality of rights guaranteed by the Fourteenth Amendment was limited to physical equality such as facilities, equipment and curricula. Expert witnesses for plaintiffs testified not only as to the inevitable harmful effect of segregation on public school children but also of the tests showing the irreparable harm to the plaintiffs and other Negro school children in Clarendon County. This testimony was disposed of in the majority opinion as follows:

> "There is testimony to the effect that mixed schools will give better education and a better understanding of the community in which the child is to live than segregated schools. There is testimony, on the other hand, that mixed schools will result in racial friction and tension and that the only practical way of conducting public education in South Carolina is with segregated schools. The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuo or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be

applied. In some states, the legislatures may well decide that segregation in public schools should be abolished, in others that it should be maintained—all depending upon the relationships existing between the races and the tensions likely to be produced by an attempt to educate the children of the two races together in the same schools. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter."

The testimony on behalf of the plaintiffs was by expert witnesses of unimpeachable qualifications. The record in this case presents for the first time in any case competent testimony of the permanent injury to Negro elementary and high school children forced to attend segregated schools. Testimony was introduced showing the irreparable damage done to the plaintiffs in this case solely by reason of racial segregation. The record also shows the unreasonableness of this racial classification. This is not theory or legislative argument. This is competent expert testimony from recognized scientists directed toward the factors recognized by the Supreme Court as determinative of the validity of similar statutory provisions. This testimony stands uncontradicted in the record.

The Supreme Court in the *McLaurin* case, *supra*, refused to apply the separate but equal doctrine to a case where, despite complete equality of physical facilities for education, the State of Oklahoma "sets McLaurin apart from the other students." (339 U. S. 641) On the other hand the Supreme Court stated: "The result is that appellant

is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." (339 U. S. 641) The Supreme Court, therefore, concluded "the conditions under which this appellant is required to receive his education deprived him of his personal and present right to the equal protection of the laws." (339 U. S. 642)

If the majority of the District Court had tested the evidence in this case by the criterion of the *McLaurin* case, it inevitably would have concluded that the segregation laws could not validly be enforced against the plaintiffs. Instead, it considered the "separate but equal" doctrine of *Plessy v. Ferguson, supra,* controlling, and limited the application of the equal protection clause exclusively to physical facilities.

This case should be reviewed on appeal for determination as to whether this conclusion is in conflict with the applicable decision of the Supreme Court.

Conclusion

For many years Negroes in the South have sought educational facilities equal to those offered other citizens. Blind adherence to the separate but equal doctrine has produced increasing inequality within a segregated system. Great progress has been made in graduate and professional education during the year since the *Sweatt* and *McLaurin* decisions. None of the harmful effects predicted in the brief filed in these cases by the attorneys general of the Southern States has materialized.

In the decision in this case, as in the *McLaurin* case, plaintiffs' individual rights have been lost in the racial group classification required by the laws of South Carolina.

Expert witnesses testified as to the harmful effects of this enforced racial segregation, i.e., the resulting injury is even more effective and harmful than in graduate education. The questions here involved are substantial and important to the interest of public education, today and in the future, to the individual's right to complete equality before the law, and to our government.

Respectfully submitted,

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July 20, 1951

APPENDIX "A"

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

(Civil Action No. 2657)

HARRY BRIGGS, JR., ET. AL., *Plaintiffs,*

vs.

R. W. ELLIOTT, Chairman, J. D. CARSON and GEORGE KENNEDY, Members of the Board of Trustees of School District No. 22, Clarendon County, S. C.; SUMMERTON HIGH SCHOOL DISTRICT, a body corporate; L. B. McCORD, Superintendent of Education for Clarendon County, and CHAIRMAN A. J. PLOWDEN, W. E. BAKER, Members of the County Board of Education for Clarendon County; and H. N. BETCHAM, Superintendent of School District No. 22,

Defendants.

DECREE

In the above entitled case the Court finds the facts to be as set forth in its written opinion filed herewith and on the basis thereof it is adjudged by the Court:

(1) That neither Article H section 7 of the Constitution of South Carolina nor section 5377 of the Code are of themselves violative of the provisions of the Fourteenth Amendment to the Constitution of the United States and plaintiffs are not entitled to an injunction forbidding segregation in the public schools of School District No. 22.

(2) That the educational facilities, equipment, curriculum and opportunities afforded in School District No. 22 for colored pupils are not substantially equal to those afforded for white pupils; that this inequality is violative of the

equal protection clause of the Fourteenth Amendment; and that plaintiffs are entitled to an injunction requiring the defendants to make available to them and to other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those afforded white pupils.

And it is accordingly ordered, adjudged and decreed that the defendants proceed at once to furnish to plaintiffs and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils;

And it is further ordered that the defendants make report to this Court within six months of this date as to the action taken by them to carry out this order.

And this cause is retained for further orders.

This the 21 day of June 1951.

/s/ JOHN J. PARKER
Chief Judge, Fourth Circuit

U. S. District Judge, Eastern District of South Carolina.

/s/ GEORGE BELL TIMMERMAN
U. S. District Judge, Eastern and Western Districts of South Carolina.

I do not join in this decree for the reasons set forth in a separate dissenting opinion.

/s/ J. WATIES WARING
U. S. District Judge, Eastern District of South Carolina.

A True Copy. Attest.
/s/ ERNEST L. AILEN
Clerk of U. S. District Court, East. Dist. So. Carolina.

DISTRICT COURT OF THE UNITED STATES
FOR THE
EASTERN DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

I concur:

/s/ GEO. BELL TIMMERMAN
U. S. Dist. Judge.

I concur:

/s/ JOHN J. PARKER
Chief Judge 4th Circuit.

HARRY BRIGGS, JR., ET. AL.; *Plaintiffs,*

versus

R. W. ELLIOTT, Chairman, J. D. CARSON and GEORGE KENNEDY, Members of the Board of Trustees of School District No. 22, Clarendon County, S. C.; SUMMERTON HIGH SCHOOL DISTRICT, a body corporate; L. B. McCORD, Superintendent of Education for Clarendon County, and CHAIRMAN A. J. PLOWDEN, W. E. BAKER, Members of the County Board of Education for Clarendon County, and H. B. BETCHAM, Superintendent of School District No. 22, *Defendants.*

On Application for Declaratory Judgment and Injunction.
Heard May 28, 1951. Decided ——

Before PARKER, Circuit Judge, and WARING and TIMMERMAN, District Judges.

HAROLD R. BOULWARE, SPOTTSWOOD ROBINSON, III, ROBERT L. CARTER, THURGOOD MARSHALL, ARTHUR SHORES and A. T. WALDEN, for Plaintiffs; T. C. CALLISON, Attorney General of South Carolina, S. E. ROGERS and ROBERT McC. FIGG, JR., for Defendants.

PARKER, Chief Judge:

This is a suit for a declaratory judgment and injunctive relief in which it is alleged that the schools and educational facilities provided for Negro children in School District No.

22 in Clarendon County, South Carolina, are inferior to those provided for white children in that district and that this amounts to a denial of the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Federal Constitution, and further that the segregation of Negro and white children in the public schools, required by Article II, section 7 of the Constitution of South Carolina and section 5377 of the Code of Laws of that state,[37] is of itself violative of the equal protection clause of the Fourteenth Amendment. Plaintiffs are Negro children of school age who are entitled to attend the public schools in District No. 22 in Clarendon County, their parents and guardian. Defendants are the school officials who, as officers of the state, have control of the schools in the district. A court of three judges has been convened pursuant to the provisions of 28 USC 2281 and 2284, the evidence offered by the parties has been heard and the case has been submitted upon the briefs and arguments of counsel.

At the beginning of the hearing the defendants admitted upon the record that "the educational facilities, equipment, curricula and opportunities afforded in School District No. 22 for colored pupils * * * are not substantially equal to those afforded for white pupils." The evidence offered in the case fully sustains this admission. The defendants contend, however, that the district is one of the rural school districts which has not kept pace with urban districts in providing educational facilities for the children of either race, and that the inequalities have resulted from limited resources and from the disposition of the school officials to spend the limited funds available "for the most immediate demands rather than in the light of the overall picture." They state that under the leadership of Governor Byrnes the Legislature of South Carolina had made provision for

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[37] Article II, section 7, of the Constitution of South Carolina is as follows: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 5377 of the Code of Laws of South Carolina of 1942 is as follows: "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

a bond issue of $75,000,000 with a three per cent sales tax to support it for the purpose of equalizing educational opportunities and facilities throughout the state and of meeting the problem of providing equal educational opportunities for Negro children where this had not been done. They have offered evidence to show that this educational program is going forward and that under it the educational facilities in the district will be greatly improved for both races and that Negro children will be afforded educational facilities and opportunities in all respects equal to those afforded white children.

There can be no question but that where separate schools are maintained for Negroes and whites, the educational facilities and opportunities afforded by them must be equal. The state may not deny to any person within its jurisdiction the equal protection of the laws, says the Fourteenth Amendment; and this means that, when the state undertakes public education, it may not discriminate against any individual on account of race but must offer equal opportunity to all. As said by Chief Justice Hughes in Missouri ex rel. Gaines v. Canada 305 U. S. 337, 349, "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." See also Sweatt v. Painter 339 U S. 629; Corbin v. County School Board of Pulaski County 4 Cir. 177 F. (2d) 924; Carter v. School Board of Arlington County, Va. 4 Cir. 182 F. (2d) 531; McKissick v. Carmichael 4 Cir. 187 F. (2d) 949. We think it clear, therefore, that plaintiffs are entitled to a declaration to the effect that the school facilities now afforded Negro children in District No. 22 are not equal to the facilities afforded white children in the district and to a mandatory injunction requiring that equal facilities be afforded them. How this shall be done is a matter for the school authorities and not for the court, so long as it is done in good faith and equality of facilities is afforded; but it must be done promptly and the court in addition to issuing an injunction to that effect will retain the cause upon its docket for further orders and will require that defendants

file within six months a report showing the action that has been taken by them to carry out the order.

Plaintiffs ask that, in addition to granting them relief on account of the inferiority of the educational facilities furnished them, we hold that segregation of the races in the public schools, as required by the Constitution and statutes of South Carolina, is of itself a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, and that we enjoin the enforcement of the constitutional provisions and statute requiring it and by our injunction require defendants to admit Negroes to schools to which white students are admitted within the district. We think, however, that segregation of the races in the public schools, so long as equality of rights is preserved, is a matter of legislative policy for the several states, with which the federal courts are powerless to interfere.

One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, i.e. the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several states more clearly recognized than in that of public education. As was well said by Mr. Justice Harlan, speaking for a unanimous court in Cumming v. Board of Education 175 U. S. 528, 545, "while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of federal authority with the management of such schools cannot be

justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

It is equally well settled that there is no denial of the equal protection of the laws in segregating children in the schools for purposes of education, if the children of the different races are given equal facilities and opportunities. The leading case on the subject in the Supreme Court is Plessy v. Ferguson 163 U. S. 537, which involved segregation in railroad trains, but in which the segregation there involved was referred to as being governed by the same principle as segregation in the schools. In that case the Court said:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

Later in the opinion the Court said:

> "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. *In determining the question of reasonableness, it is at liberty to act with reference to the estab-*

lished usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." (Italics supplied).

Directly in point and absolutely controlling upon so long as it stands unreversed by the Supreme Court is Gong Lum v. Rice, 275 U. S. 78, in which the complaint was that a child of Chinese parentage was excluded from a school maintained for white children under a segregation law and was permitted to enter only a school maintained for colored children. Although attempt is made to distinguish this case, it cannot be distinguished. The question as to the validity of segregation in the public schools on the ground of race was squarely raised, the Fourteenth Amendment was relied upon as forbidding segregation and the issue was squarely met by the Court. What was said by Chief Justice Taft speaking for a unanimous court, is determinative of the question before us. Said he:

> "The case then reduces itself to the question whether a state can be said to afford to a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws giving her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.
>
> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. * * *
>
> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts

under the Federal Constitution. Roberts v. City of Boston 5 Cush. (Mass.) 198, 206, 208, 209; State ex rel. Garnes v. McCann, 21 Oh. St. 198, 210, People ex rel. King v. Gallagher 93 N. Y. 438; People ex rel. Cisco v. School Board 161 N. Y. 598; Ward v. Flood 48 Cal. 36; Wysinger v. Crookshand 82 Cal. 588, 590; Reynolds v. Board of Education 66 Kans. 672; McMillan v. School Committee 107 N. S. 609; Cory v. Carter 46 Ind. 327; Lehew v. Brummell 103 Mo. 546; Dameron v. Bayless 14 Ariz. 180; State ex rel. Stoutmeyer v. Duffy 7 Nev. 342, 348, 355; Bertonneau v. Board, 3 Woods 177, s.c. 3 Fed. Cas. 294, Case No. 1,361; United States v. Buntin 10 F. 730, 735; Wong Him v. Callahan, 119 F. 381.

"In Plessy v. Ferguson 163 U. S. 537, 544, 545, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, *a more difficult question than this,* this Court, speaking of permitted race separation said:

"'The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.'

"Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. *The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment.*". (Italics supplied.)

Only a little over a year ago, the question was before the Court of Appeals of the District of Columbia in Carr v. Corning, D. C. Cir. 182 F. 2d 14, a case involving the validity of segregation within the District, and the whole matter

was exhaustively explored in the light of history and the pertinent decisions in an able opinion by Judge Prettyman, who said:

"It is urged that the separation of the races is itself, apart from equality or inequality of treatment, forbidden by the Constitution. The question thus posed is whether the Constitution lifted this problem out of the hands of all legislatures and settled it. We do not think it did. Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of experimentation, of development, of adjustment to the current necessities in a variety of community circumstance. We do not believe that the makers of the first ten Amendments in 1789 or of the Fourteenth Amendment in 1866 meant to foreclose legislative treatment of the problem in this country.

"This is not to decry efforts to reach that state of common existence which is the obvious highest good in our concept of civilization. It is merely to say that the social and economic interrelationship of two races living together is a legislative problem, as yet not solved, and is not a problem solved fully, finally and unequivocally by a fiat enacted many years ago. We must remember that on this particular point we are interpreting a constitution and not enacting a statute.

"We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights cases, and the fact that in 1862, 1864 and 1874 Congress, as we shall point out in a moment, enacted legislation which specifically

provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect.

"The Supreme Court has consistently held that if there be an 'equality of the privileges which the laws give to the separated groups,' the races may be separated. That is to say that constitutional invalidity does not arise from the mere fact of separation but may arise from an inequality of treatment. Other courts have long held to the same effect."

It should be borne in mind that in the above cases the courts have not been dealing with hypothetical situations or mere theory, but with situations which have actually developed in the relationship of the races throughout the country. Segregation of the races in the public schools has not been confined to South Carolina or even to the South but prevails in many other states where Negroes are present in large numbers. Even when not required by law, it is customary in many places. Congress has provided for it by federal statute in the District of Columbia; and seventeen of the states have statutes or constitutional provisions requiring it. They are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.[38] And the validity of legislatively requiring segregation in the schools has been upheld wherever the question has been raised. See Wong Him v. Callahan, 119 F. 381; United States v. Buntin, 10 F. 730; Bertonneau v. Board of Directors, 3 Fed. Cas. 294, No. 1361; Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273; Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; Graham v. Board of Education, 153 Kan. 840, 114 P. 2d 313; Richardson v. Board of Education, 72 Kan. 629, 84 Pac. 538; Reynolds v. Board of Education, 66 Kan. 672, 72 Pac. 274; Chrisman v. Mayor, 70 Miss,

[38] Statistical Summary of Education, 1947-48, "Biennial Survey of Education in the United States, 1946-48", ch. 1 pp. 8, 40 (Federal Security Agency, Office of Education).

477, 12 So. 458; Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895; State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713; People v. School Board, 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 113; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823; State v. McCann, 21 Ohio St. 198; Board of Education v. Board of Com'rs, 14 Okla. 322, 78 Pac. 455; Martin v. Board of Education, 42 W. Va. 514, 26 S. E. 348.[39] No cases have been cited to us holding that such legislation is violative of the Fourteenth Amendment. We know of none and diligent search of the authorities has failed to reveal any.

Plaintiffs reply upon expressions contained in opinions relating to professional education such as Sweatt v. Painter, 339 U. S. 629; McLaurin v. Oklahoma State Regents, 339 U. S. 637, and McKissick v. Carmichael, 4 Cir. 187 F. 2d 949, where equality of opportunity was not afforded. Sweatt v. Painter, however, instead of helping them, emphasizes that the separate but equal doctrine of Plessy v. Ferguson has not been overruled, since the Supreme Court, although urged to overrule it, expressly refused to do so and based its decision on the ground that the educational facilities offered Negro law students in that case were not equal to those offered white students. The decision in McKissick v. Carmichael was based upon the same ground. The case of McLaurin v. Oklahoma State Regents involved humiliating and embarrassing treatment of a Negro law student to which no one should have been required to submit. Nothing of the sort is involved here.

The problem of segregation as applied to graduate and professional education is essentially different from that involved in segregation in education at the lower levels. In the graduate and professional schools the problem is one of affording equal educational facilities to persons sui juris and of mature personality. Because of the great expense of such education and the importance of the professional contacts established while carrying on the educational proc-

[39] See also Roberts v. City of Boston, 5 Cush. (Mass.) 198, decided prior to the Fourteenth Amendment.

ess, it is difficult for the state to maintain segregated schools for Negroes in this field which will afford them opportunities for education and professional advancement equal to those afforded by the graduate and professional schools maintained for white persons. What the courts have said, and all they have said in the cases upon which plaintiffs rely is that, notwithstanding these difficulties, the opportunity afforded the Negro student must be equal to that afforded the white student and the schools established for furnishing this instruction to white persons must be opened to Negroes if this is necessary to give them the equal opportunity which the Constitution requires.

The problem of segregation at the common school level is a very different one. At this level, as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture. Moreover, education at this level is not a matter of voluntary choice on the part of the student but of compulsion by the state. The student is taken from the control of the family during school hours by compulsion of law and placed in control of the school, where he must associate with his fellow students. The law thus provides that the school shall supplement the work of the parent in the training of the child and in doing so it is entering a delicate field and one fraught with tensions and difficulties. In formulating educational policy at the common school level, therefore, the law must take account, not merely of the matter of affording instruction to the student, but also of the wishes of the parents as to the upbringing of the child and his associates in the formative period of childhood and adolescence. If public education is to have the support of the people through their legislatures, it must not go contrary to what they deem for the best interests of their children.

There is testimony to the effect that mixed schools will give better education and a better understanding of the community in which the child is to live than segregated schools. There is testimony, on the other hand, that mixed schools will result in racial friction and tension and that the only practical way of conducting public education in

South Carolina is with segregated schools. The questions thus presented are not questions of constitutional right but of legislative policy, which must be formulated, not in vacuo or with doctrinaire disregard of existing conditions, but in realistic approach to the situations to which it is to be applied. In some states, the legislatures may well decide that segregation in public schools should be abolished, in others that it should be maintained—all depending upon the relationships existing between the races and the tensions likely to be produced by an attempt to educate the children of the two races together in the same schools. The federal courts would be going far outside their constitutional function were they to attempt to prescribe educational policies for the states in such matters, however desirable such policies might be in the opinion of some sociologists or educators. For the federal courts to do so would result, not only in interference with local affairs by an agency of the federal government, but also in the substitution of the judicial for the legislative process in what is essentially a legislative matter.

The public schools are facilities provided and paid for by the states. The state's regulation of the facilities which it furnishes is not to be interfered with unless constitutional rights are clearly infringed. There is nothing in the Constitution that requires that the state grant to all members of the public a common right to use every facility that it affords. Grants in aid of education or for the support of the indigent may properly be made upon an individual basis if no discrimination is practiced; and, if the family, which is the racial unit, may be considered in these, it may be considered also in providing public schools. The equal protection of the laws does not mean that the child must be treated as the property of the state and the wishes of his family as to his upbringing be disregarded. The classification of children for the purpose of education in separate schools has a basis grounded in reason and experience; and, if equal facilities are afforded, it cannot be condemned as discriminatory for, as said by Mr. Justice Reed in New York Rapid Transit Corp. v. City of New York, 303 U. S. 573, 578: "It has long been the law under

the Fourteenth Amendment that 'a distinction in legislation is not arbitrary, if any state of facts can be conceived that would sustain it.' " [40]

We are cited to cases having relation to zoning ordinances, restrictive covenants in deeds and segregation in public conveyances. It is clear, however, that nothing said in these cases would justify our disregarding the great volume of authority relating directly to education in the public schools, which involves not transient contacts, but associations which affect the interests of the home and the wishes of the people with regard to the upbringing of their children. As Chief Justice Taft pointed out in Gong Lum v. Rice, supra, "a more difficult" question is presented by segregation in public conveyances than by segregation in the schools.

We conclude, therefore, that if equal facilities are offered, segregation of the races in the public schools as prescribed by the Constitution and laws of South Carolina is not of itself violative of the Fourteenth Amendment. We think that this conclusion is supported by overwhelming authority which we are not at liberty to disregard on the basis of theories advanced by a few educators and sociologists. Even if we felt at liberty to disregard other authorities, we may not ignore the unreversed decisions of the Supreme Court of the United States which are squarely in point and conclusive of the question before us. As said by the Court of Appeals of the Fourth Circuit in Boyer v. Garrett, 183 F. 2d 582, a case involving segregation in a public playground, in which equality of treatment was admitted and

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[40] See also, East v. Van Deman & Lewis Co., 240 U. S. 342, 357; Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 209; Metropolitan Casualty Ins. Co. v. Brownell 294 U. S. 580, 584; State Board of Tax Com'rs v. Jackson 283 U. S. 527, 537; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78; Alabama State Federation of Labor v. McAdory 325 U. S. 450, 465; Asbury Hospital v. Cass County, N. D. 326 U. S. 297, 215; Carmichael V. Southern Coal & Coke Co., 301 U. S. 495, 509; South Carolina Power Co. v. South Carolina Tax Com'n, 4 Cir. 52 F. (2d) 515, 518; United States v Carolene Products Co. 304 U. S. 144, 152; Bowles v. American Brewery, 4 Cir. 147 F. 2d 842, 847; White Packing Co. v. Robertson, 4 Cir. 89 F. 2d 775, 779.

segregation was attacked as being per se violative of the Fourteenth Amendment:

> "The contention of plaintiffs is that, notwithstanding this equality of treatment, the rule providing for segregation is violative of the provisions of the federal Constitution. The District Court dismissed the complaint on the authority of Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; and the principal argument made on appeal is that the authority of Plessy v. Ferguson has been so weakened by subsequent decisions that we should no longer consider it as binding. We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from reexamining, although urged to do so, in the very recent case of Sweatt v. Painter, 70 S. Ct. 848. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and

not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.

It is argued that, because the school facilities furnished Negroes in District No. 22 are inferior to those furnished white persons, we should enjoin segregation rather than direct the equalizing of conditions. In as much as we think that the law requiring segregation is valid, however, and that the inequality suffered by plaintiffs results, not from the law, but from the way it has been administered, we think that our injunction should be directed to removing the inequalities resulting from administration within the framework of the law rather than to nullifying the law itself. As a court of equity, we should exercise our power to assure to plaintiffs the equality of treatment to which they are entitled with due regard to the legislative policy of the state. In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort. See Corbin v. County School Board of Arlington County, Virginia, 4 Cir. 182 F. 2d 531. The court should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise. This much is demanded by the spirit of comity which must prevail in the relationship between the agencies of the federal government and the states if our constitutional system is to endure.

Decree will be entered finding that the constitutional and statutory provisions requiring segregation in the public schools are not of themselves violative of the Fourteenth Amendment, but that defendants have denied to plaintiffs rights guaranteed by that amendment in failing to furnish for Negroes in School District 22 educational facilities and opportunities equal to those furnished white persons, and injunction will issue directing defendants promptly to furnish Negroes within the district educational facilities

and opportunities equal to those furnished white persons and to report to the court within six months as to the action that has been taken by them to effectuate the court's decree.

Injunction to Abolish Segregation Denied.

Injunction to Equalize Educational Facilities Granted.

A True Copy, Attest.

/s/ Ernest L. Allen
Clerk of U. S. District Court
East. Dist. So. Carolina.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 2657

Harry Briggs, Jr., et als, *Plaintiffs,*

vs.

R. W. Elliott, Chairman, et al., *Defendants*

Dissenting Opinion

This case has been brought for the express and declared purpose of determining the right of the State of South Carolina, in its public schools, to practice segregation according to race.

The Plaintiffs are all residents of Clarendon County, South Carolina which is situated within the Eastern District of South Carolina and within the jurisdiction of this Court. The Plaintiffs consist of minors and adults there being forty-six minors who are qualified to attend and are attending the public schools in School District 22 of Clarendon County; and twenty adults who are taxpayers and are either guardians or parents of the minor Plaintiffs. The Defendants are members of the Board of Trustees of School District 22 and other officials of the educational system of

Clarendon County including the superintendent of education. They are the parties in charge of the various schools which are situated within the aforesaid school district and which are affected by the matters set forth in this cause.

The Plaintiffs allege that they are discriminated against by the Defendants under color of the Constitution and laws of the State of South Carolina whereby they are denied equal educational facilities and opportunities and that this denial is based upon difference in race. And they show that the school system of this particular school district and county (following the general pattern that it is admitted obtains in the State of South Carolina) sets up two classes of schools; one for people said to belong to the white race and the other for people of other races but primarily for those said to belong to the Negro race or of mixed races and either wholly, partially, or faintly alleged to be of African or Negro descent. These Plaintiffs bring this action for the enforcement of the rights to which they claim they are entitled and on behalf of many others who are in like plight and condition and the suit is denominated a class suit for the purpose of abrogation of what is claimed to be the enforcement of unfair and discriminatory laws by the Defendants. Plaintiffs claim that they are entitled to bring this case and that this court has jurisdiction under the Fourteenth Amendment of the Constitution of the United States and of a number of statutes of the United States, commonly referred to as civil rights statutes.[41] The Plaintiffs demand relief under the above referred to sections of the laws of the United States by way of a Declaratory Judgment and Permanent Injunction.

It is alleged that the Defendants are acting under the authority granted them by the Constitution and laws of the State of South Carolina and that all of these are in contravention of the Constitution and laws of the United States.

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[41] Fourteenth Amendment of the Constitution of the United States, Section 1; Title 8, USCA, Section 41, Section 43; Title 28, USCA, Section 1343.

The particular portions of the laws of South Carolina are as follows:

Article XI, Section 5 is as follows:

> "Free Public Schools—The General Assembly shall provide for a liberal system of free public schools for all children between the ages of six and twenty-one years . . ."

Article XI, Section 7 is as follows:

> "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 5377 of the Code of Laws of South Carolina is as follows:

> "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

It is further shown that the Defendants are acting under the authority of the Constitution and laws of the State of South Carolina providing for the creation of various school districts,[42] and they have strictly separated and segregated the school facilities, both elementary and high school, according to race. There are, in said school district, three schools which are used exclusively by Negroes: to wit, Rambay Elementary School, Liberty Hill Elementary School, and Scotts Branch Union (a combination of elementary and high school). There are in the same school district, two schools maintained for whites, namely, Summerton Elementary School and Summerton High School. The last named serves some of the other school districts in Clarendon County as well as No. 22.

It appears that the Plaintiffs filed a petition with the Defendants requesting that the Defendants cease dis-

[42] Constitution of South Carolina, Article XI, Section 5. Code of Laws, 5301, 5316, 5328, 5404 and 5405. Code of Laws of South Carolina, Sections 5303, 5306, 5343, 5405.

crimination against the Negro children of public school age; and the situation complained of not having been remedied or changed, the Plaintiffs now ask this Court to require the Defendants to grant them their rights guaranteed under the Fourteenth Amendment of the Constitution of the United States and they appeal to the equitable power of this Court for declaratory and injunctive relief alleging that they are suffering irreparable injuries and that they have no plain adequate or complete remedy to redress the wrongs and illegal acts complained of other than this suit. And they further point out that large numbers of people and persons are and will be affected by the decision of this Court in adjudicating and clarifying the rights of Negroes to obtain education in the public school system of the State of South Carolina without discrimination and denial of equal facilities on account of their race.

The Defendants appear and by way of answer deny the allegations of the Complaint as to discrimination and inequality and allege that not only are they acting within the laws of the State in enforcing segregation but that all facilities afforded the pupils of different races are adequate and equal and that there is no inequality or discrimination practiced against these Plaintiffs or any others by reason of race or color. And they allege that the facilities and opportunities furnished to the colored children are substantially the same as those provided for the white children. And they further base their defense upon the statement that the Constitutional and statutory provisions under attack in this case, that is to say, the provisions requiring separate schools because of race, are a reasonable exercise of the State's police power and that all of the same are valid under the powers possessed by the State of South Carolina and the Constitution of the United States and they deny that the same can be held to be unconstitutional by this Court.

The issues being so drawn and calling for a judgment by a United States Court which would require the issuance of an injunction against State and County officials, it became apparent that it would be necessary that the case be heard in accordance with the statute applicable to cases

of this type requiring the calling of a three-judge court.[43] Such a court convened and the case was set for a hearing on May 28, 1951.

The case came on for a trial upon the issues as presented in the Complaint and Answer. But upon the call of the case, Defendants' counsel announced that they wished to make a statement on behalf of the Defendants making certain admissions and praying that the Court make a finding as to inequalities in respect to buildings, equipment, facilities, curricula and other aspects of the schools provided for children in School District 22 in Clarendon County and giving the public authorities time to formulate plans for ending such inequalities. In this statement Defendants claim that they never had intended to discriminate against any of the pupils and although they had filed an answer to the Complaint, some five months ago, denying inequalities, they now admit that they had found some; but rely upon the fact that subsequent to the institution of this suit, James F. Byrnes, the Governor of South Carolina, had stated in his inaugural address that the State must take steps to provide money for improving educational facilities and that thereafter, the Legislature had adopted certain legislation. They stated that they hoped that in time they would obtain money as a result of the foregoing and improve the school situation.

This statement was allowed to be filed and considered as an amendment to the Answer.

By this maneuver, the Defendants have endeavored to induce this Court to avoid the primary purpose of the suit. And if the Court should follow this suggestion and fail to meet the issues raised by merely considering this case in the light of another "separate but equal" case, the entire purpose and reason for the institution of the case and the convening of a three-judge court would be voided. The sixty-six (66) Plaintiffs in this cause have brought this suit at what must have cost much in effort and financial expenditures. They are here represented by six attorneys, all, save one, practicing lawyers from without the State of

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[43] Title 28, USCA, Sections 2281-84.

South Carolina and coming here from a considerable distance. The Plaintiffs have brought a large number of witnesses exclusive of themselves. As a matter of fact, they called and examined eleven witnesses. They said that they had a number more coming who did not arrive in time owing to the shortening of the proceedings and they also stated that they had on hand and had contemplated calling a large number of other witnesses but this became unnecessary by reason of the foregoing admissions by Defendants. It certainly appears that large expenses must have been caused by the institution of this case and great efforts expended in gathering data, making a study of the issues involved, interviewing and bringing numerous witnesses, some of whom are foremost scientists in America. And in addition to all of this, these sixty-six Plaintiffs have not merely expended their time and money in order to test this important Constitutional question, but they have shown unexampled courage in bringing and presenting this cause at their own expense in the face of the long established and age-old pattern of the way of life which the State of South Carolina has adopted and practiced and lived in since and as a result of the institution of human slavery.

If a case of this magnitude can be turned aside and a court refuse to hear these basic issues by the mere device of an admission that some buildings, blackboards, lighting fixtures and toilet facilities are unequal but that they may be remedied by the spending of a few dollars, then, indeed people in the plight in which these Plaintiffs are, have no adequate remedy or forum in which to air their wrongs. If this method of judicial evasion be adopted, these very infant Plaintiffs now pupils in Clarendon County will probably be bringing suits for their children and grandchildren decades or rather generations hence in an effort to get for their descendants what are today denied to them. If they are entitled to any rights as American citizens, they are entitled to have these rights now and not in the future. And no excuse can be made to deny them these rights which are theirs under the Constitution and laws of America by the use of the false doctrine and patter called "separate but equal" and it is the duty of the Court to meet these

issues simply and factually and without fear, sophistry and evasion. If this be the measure of justice to be meted out to them, then, indeed, hundreds, may thousands, of cases will have to be brought and in each case thousands of dollars will have to be spent for the employment of legal talent and scientific testimony and then the cases will be turned aside, postponed or eliminated by devices such as this.

We should be unwilling to straddle or avoid this issue and if the suggestions made by these Defendants is to be adopted as the type of justice to be meted out by this Court, then I want no part of it.

And so we must and do face, without evasion or equivocation, the question as to whether segregation in education in our schools is legal or whether it cannot exist under our American system as particularly enunciated in the Fourteenth Amendment to the Constitution of the United States.

Before the American Civil War, the institution of human slavery had been adopted and was approved in this country. Slavery was nothing new in the world. From the dawn of history we see aggressors enslaving weak and less fortunate neighbors. Back through the days of early civilizations man practiced slavery. We read of it in Biblical days; we read of it in the Greek City States and in the great Roman Empire. Throughout medieval Europe, forms of slavery existed and it was widely practiced in Asia Minor and the Eastern countries and perhaps reached its worst form in Nazi Germany. Class and caste have, unfortunately, existed through the ages. But, in time, mankind, through evolution and progress, through ethical and religious concepts, through the study of the teachings of the great philosophers and the great religious teachers, including especially the founder of Christianity—mankind began to revolt against the enslavement of body, mind and soul of one human being by another. And so there came about a great awakening. The British, who had indulged in the slave trade, awakened to the fact that it was immoral and against the right thinking ideology of the Christian world. And in this country, also, came about a moral awakening. Unfortunately, this had not been sufficiently advanced at the time of the adoption of the American Con-

stitution for the institution of slavery to be prohibited. But there was a struggle and the better thinking leaders in our Constitutional Convention endeavored to prohibit slavery but unfortunately compromised the issue on the insistent demands of those who were engaged in the slave trade and the purchase and use of slaves. And so as time went on, slavery was perpetuated and eventually became a part of the life and culture of certain of the States of this Union although the rest of the world looked on with shame and abhorrence.

As was so well said, this country could not continue to exist one-half slave and one-half free and long years of war were entered into before the nation was willing to eradicate this system which was, itself, a denial of the brave and fine statements of the Declaration of Independence and a denial of freedom as envisioned and advocated by our Founders.

The United States then adopted the 13th, 14th and 15th Amendments and it cannot be denied that the basic reason for all of these Amendments to the Constitution was to wipe out completely the institution of slavery and to declare that all citizens in this country should be considered as free, equal and entitled to all of the provisions of citizenship.

The Fourteenth Amendment to the Constitution of the United States is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It seems to me that it is unecessary to pore through voluminous arguments and opinions to ascertain what the foregoing means. And while it is true that we have had

hundreds, perhaps thousands, of legal opinions outlining and defining the various effects and overtones on our laws and life brought about by the adoption of this Amendment, one of ordinary ability and understanding of the English language will have no trouble in knowing that when this Amendment was adopted, it was intended to do away with discrimination between our citizens.

The Amendment refers to *all* persons. There is nothing in there that attempts to separate, segregate or discriminate against any persons because of their being of European, Asian or African ancestry. And the plain intendment is that all of these persons are citizens. And then it is provided that no State shall make or enforce any law which shall abridge the privileges of citizens nor shall any State deny "to *any person* within its jurisdiction the equal protection of the laws."

The Amendment was first proposed in 1866 just about a year after the end of the American Civil War and the surrender of the Confederate States government. Within two years, the Amendment was adopted and became part of the Constitution of the United States. It cannot be gainsaid that the Amendment was proposed and adopted wholly and entirely as a result of the great conflict between freedom and slavery. This will be amply substantiated by an examination and appreciation of the proposal and discussion and Congressional debates (See Flack on Adoption of the 14th Amendment) and so it is undeniably true that the three great Amendments were adopted to eliminate not only slavery, itself, but all idea of discrimination and difference between American citizens.

Let us now come to consider whether the Constitution and Laws of the State of South Carolina which we have heretofore quoted are in conflict with the true meaning and intendment of this Fourteenth Amendment. The whole discussion of race and ancestry has been intermingled with sophistry and prejudice. What possible definition can be found for the so-called white race, Negro race or other races? Who is to decide and what is the test? For years, there was much talk of blood and taint of blood. Science tells us that there are but four kinds of blood: A, B, AB

and O and these are found in Europeans, Asiatics, Africans, Americans and others. And so we need not further consider the irresponsible and baseless references to preservation of "Caucasian blood." So then, what test are we going to use in opening our school doors and labeling them "white" and "Negro"? The law of South Carolina considers a person of one-eighth African ancestry to be a Negro. Why this proportion? Is it based upon any reason anthropological, historical or ethical? And how are the trustees to know who are "whites" and who are "Negroes"? If it is dangerous and evil for a white child to be associated with another child, one of whose great-grandparents was of African descent, is it not equally dangerous for one with a one-sixteenth percentage? And if the State has decided that there is danger in contact between the whites and Negroes, isn't it requisite and proper that the State furnish a series of schools one for each of these percentages? If the idea is perfect racial equality in educational systems, why should children of pure African descent be brought in contact with children of one-half, one-fourth, or one-eighth such ancestry? To ask these questions is sufficient answer to them. The whole thing is unreasonable, unscientific and based upon unadulterated prejudice. We see the results of all of this warped thinking in the poor underprivileged and frightened attitude of so many of the Negroes in the southern States; and in the sadistic insistence of the "white supremacists" in declaring that their will must be imposed irrespective of rights of other citizens. This claim of "white supremacy," while fantastic and without foundation, is really believed by them for we have had repeated declarations from leading politicians and governors of this State and other States declaring that "white supremacy" will be endangered by the abolition of segregation. There are present threats, including those of the present Governor of this State, going to the extent of saying that all public education may be abandoned if the courts should grant true equality in educational facilities.

Although some 73 years have passed since the adoption of the Fourteenth Amendment and although it is clearly apparent that its chief purpose (perhaps we may say its

only real purpose), was to remove from Negroes the stigma and status of slavery and to confer upon them full rights as citizens, nevertheless, there has been a long and arduous course of litigation through the years. With some setbacks here and there, the Courts have generally and progressively recognized the true meaning of the Fourteenth Amendment and have, from time to time, stricken down the attempts made by State governments (almost entirely those of the former Confederate States) to restrict the Amendment and to keep Negroes in a different classification so far as their rights and privileges as citizens are concerned. A number of cases have reached the Supreme Court of the United States wherein it became necessary for that tribunal to insist that Negroes be treated as citizens in the performance of jury duty. See Strauder v. West Virginia 4, where the Court says at page 307:[44]

> ". . . What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

Many subsequent cases have followed and confirmed the right of Negroes to be treated as equals in all jury and grand jury service in the States.

The Supreme Court has stricken down from time to time statutes providing for imprisonment for violation of con-

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[44] 100 U. S. 303.

tracts. These are known as peonage cases and were in regard to statutes primarily aimed at keeping the Negro "in his place."[45]

In the field of transportation the Court has now, in effect declared that common carriers engaged in interstate travel must not and cannot segregate and discriminate against passengers by reason of their race or color.[46]

Frequent and repeated instances of prejudice in criminal cases because of the brutal treatment of defendants because of their color have been passed upon in a large number of cases.[47]

Discrimination by segregation of housing facilities and attempts to control the same by covenants have also been outlawed.[48]

In the field of labor employment and particularly the relation of labor unions to the racial problem, discrimination has again been forbidden.[49]

Perhaps the most serious battle for equality of rights has been in the field of exercise of suffrage. For years, certain of the southern States have attempted to prevent the Negro from taking part in elections by various devices. It is unnecessary to enumerate the long list of cases, but from time to time, courts have stricken down all of these various devices classed as the "grandfather clause," educational tests and white private clubs.[50]

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[45] Peonage: Bailey v. Alabama, 219 U. S. 219; U. S. v. Reynolds, 235 U. S. 133.

[46] Transportation: Mitchell v. U. S., 313 U. S. 80; Morgan v. Virginia, 328 U. S. 373; Henderson v. U. S., 339 U. S. 816; Chance v. Lambeth, 186 F. 2nd 879; Certiorari denied May 28, 1951.

[47] Criminals: Brown v. Mississippi, 297 U. S. 278; Chambers v. Florida, 309 U. S. 227; Shepherd v. Florida, 341 U. S. 50.

[48] Housing: Buchanan v. Warley, 245 U. S. 60; Shelley v. Kraemer, 334 U. S. 1.

[49] Labor: Steele v. L. & N. R. R. Co., 323 U. S. 192; Tunstall v. Brotherhood, 323 U. S. 210.

[50] Suffrage: Guinn v. U. S., 238 U. S. 347; Nixon v. Herndon, 273 U. S. 536; Lane v. Wilson, 307 U. S. 268; Smith v. Allwright, 321 U. S. 649; Elmore v. Rice, 72 F. Supp. 516; 165 F. 2nd 387; Certiorari denied, 333 U. S. 875; Brown v. Baskin, 78 F. Supp. 933; Brown v. Baskin, 80 F. Supp. 1017; 174 F. 2nd 391.

The foregoing are but a few brief references to some of the major landmarks in the fight by Negroes for equality. We now come to the more specific question, namely, the field of education. The question of the right of the State to practice segregation by race in certain educational facilities has only recently been tested in the courts. The cases of Gaines v. Canada, 305 U. S. 337 and Sipuel v. Board of Regents, 332 U. S. 631, decided that Negroes were entitled to the same type of legal education that whites were given. It was further decided that the equal facilities must be furnished without delay or as was said in the Sipuel case, the State must provide for equality of education for Negroes "as soon as it does for applicants of any other group." But still we have not reached the exact question that is posed in the instant case.

We now come to the cases that, in my opinion, definitely and conclusively establish the doctrine that separation and segregation according to race is a violation of the Fourteenth Amendment. I, of course, refer to the cases of Sweatt v. Painter, 339 U. S. 629 and McLaurin v. Oklahoma State Regents, 339 U. S. 637. These cases have been followed in a number of lower Court decisions so that there is no longer any question as to the rights of Negroes to enjoy all the rights and facilities afforded by the law schools of the States of Virginia, Louisiana, Delaware, North Carolina and Kentucky. So there is no longer any basis for a State to claim the power to separate according to race in graduate schools, universities and colleges.

The real rock on which the Defendants base their case is a decision of the Supreme Court of the United States in the case of Plessy v. Ferguson, 163 U. S. 537. This case arose in Louisiana and was heard on appeal in 1895. The case related to the power of the State of Louisiana to require separate railroad cars for white and colored passengers and the Court sustained the State's action. Much discussion has followed this case and the reasoning and decision has been severely criticized for many years. And the famous dissenting opinion by Mr. Justice Harlan has been quoted throughout the years as a true declaration of the meaning of the Fourteenth Amendment and of the spirit of the American Constitution and the American way

of life. It has also been frequently pointed out that when that decision was made, practically all the persons of the colored or Negro race had either been born slaves or were the children of slaves and that as yet due to their circumstances and surroundings, and the condition in which they had been kept by their former masters, they were hardly looked upon as equals or as American citizens. The reasoning of the prevailing opinion in the Plessy case stems almost completely from a decision by Chief Justice Shaw of Massachusetts,[51] which decision was made many years before the Civil War and when, of course, the Fourteenth Amendment had not even been dreamed of.

But these arguments are beside the point in the present case. And we are not called upon to argue or discuss the validity of the Plessy case.

Let it be remembered that the Plessy case decided that separate railroad accommodations might be required by a State in intra-state transportation. How similar attempts relating to inter-state transportation have fared have been shown in the foregoing discussion and notes.[52] It has been said and repeated here in argument that the Supreme Court has refused to review the Plessy case in the Sweatt, McLaurin and other cases and this has been pointed to as proof that the Supreme Court retains and approves the validity of Plessy. It is astonishing that such an argument should be presented or used in this or any other Court. The Supreme Court in Sweatt and McLaurin was not considering railroad accommodations. It was considering education just as we are considering it here and the Supreme Court distinctly and unequivocally held that the attempt to separate the races in education was violative of the Fourteenth Amendment of the Constitution. Of course, the Supreme Court did not consider overruling Plessy. It was not considering railroad matters, had no arguments in regard to it, had no business or concern with railroad accommodations and should not have even been asked to refer to

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[51] Roberts v. City of Boston, 5 Cush. 198.

[52] See cases cited in Note 6.

that case since it had no application on business in the consideration of an educational problem before the Court. It seems to me that we have already spent too much time and wasted efforts in attempting to show any similarity between traveling in a railroad coach in the confines of a State and furnishing education to the future citizens of this country.

The instant case which relates to lower school education is based upon exactly the same reasoning followed in the Sweatt and McLaurin decisions. In the Sweatt case, it was clearly recognized that a law school for Negro students had been established and that the Texas courts had found that the privileges, advantages and opportunities offered were substantially equivalent to those offered to white students at the University of Texas. Apparently, the Negro school was adequately housed, staffed and offered full and complete legal education, but the Supreme Court clearly recognized that education does not alone consist of fine buildings, class room furniture and appliances but that included in education must be all the intangibles that come into play in preparing one for meeting life. As was so well said by the Court:

> "... Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

And the Court quotes with approval from its opinion in Shelley v. Kramer (supra):

> "... Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

The Court further points out that this right to a proper and equal education is a personal one and that an individual is entitled to the equal protection of the laws. And in closing, the Court referring to certain cases cited, says:

> "In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of

other races. Such education is not available to him in a separate law school as offered by the State."

In the companion case of McLaurin v. Oklahoma State Regents, McLaurin was a student who was allowed to attend the same classes, hear the same lectures, stand the same examinations and eat in the same cafeteria; but he sat in a marked off place and had a separate table assigned to him in the library and another one in the cafeteria. It was said with truth that these separations were merely nominal and that the seats and other facilities were just as good as those afforded to white students. But the Supreme Court says that even though this be so:

> "These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students and, in general, to learn his profession.
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> "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained."

The recent case of McKissick v. Carmichael, 187 F. 2nd 949 wherein the question of admission to the law school of the University of North Carolina was decided

follows and amplifies the reasoning of the Sweatt and McLaurin cases. In the McKissick case, officials of the State of North Carolina took the position that they had adopted a fixed and continued purpose to establish and build up separate schools for equality in education and pointed with pride to the large advances that they had made. They showed many actual physical accomplishments and the establishment of a school which they claimed was an equal in many respects and superior in some respects to the school maintained for white students. The Court of Appeals for the 4th Circuit in this case, speaking through Judge Soper, meets this issue without fear or evasion and says:

> "These circumstances are worthy of consideration by any one who is responsible for the solution of a difficult racial problem; but they do not meet the complainants' case or overcome the deficiencies which it discloses. Indeed the defense seeks in part to avoid the charge of inequality by the paternal suggestion that it would be beneficial to the colored race in North Carolina as a whole, and to the individual plaintiffs in particular, if they would cooperate in promoting the policy adopted by the State rather than seek the best legal education which the State provides. The duty of the federal courts, however, is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies."

In the instant case, the Plaintiffs produced a large number of witnesses. It is significant that the Defendants brought but two. These last two were not trained educators. One was an official of the Clarendon schools who said that the school system needed improvement and that the school officials were hopeful and expectant of obtaining money from State funds to improve all facilities. The other witness, significantly named Crow, has been recently employed by a commission just established, which it is proposed, will supervise educational facilities in the State

and will handle monies if, as and when the same are received sometime in the future. Mr. Crow did not testify as an expert on education although he stated flatly that he believed in separation of the races and that he heard a number of other people say so, including some Negroes, but he was unable to mention any of their names. Mr. Crow explained what was likely and liable to happen under the 1951 State Educational Act to which frequent reference was made in argument on behalf of the Defense.

It appears that the Governor of this State called upon the legislature to take action in regard to the dearth of educational facilities in South Carolina pointing out the low depth to which the State had sunk. As a result, an act of the legislature was adopted (this is a part of the General Appropriations Act adopted at the recent session of the legislature and referred to as the 1951 School Act). This act provides for the appointment of a commission which is to generally supervise educational facilities and imposes sales taxes in order to raise money for educational purposes and authorizes the issuance of bonds not to exceed the sum of $75,000,000 for the purpose of making grants to various counties and school districts to defray the cost of capital improvement in schools. The commission is granted wide power to accept applications for and approve such grants as loans. It is given wide power as to what schools and school districts are to receive monies and it is also provided, that from the taxes there are to be allocated funds to the various schools based upon the enrollment of pupils. Nowhere is it specifically provided that there shall be equality of treatment as between whites and Negroes in the school system. It is openly and frankly admitted by all parties that the present facilities are hopelessly disproportional and no one knows how much money would be required to bring the colored school system up to a parity with the white school system. The estimates as to the cost merely of equalization of physical facilities run anywhere from forty to eighty million dollars. Thus, the position of the Defendants is that the rights applied for by the Plaintiffs are to be denied now because the State of South Carolina intends (as evidenced by a general appropriations

bill enacted by the legislature and a speech made by its Governor) to issue bonds, impose taxes, raise money and do something about the inadequate schools in the future. There is no guarantee or assurance as to when the money will be available. As yet, no bonds have been printed or sold. No money is in the treasury. No plans have been drawn for school buildings or order issued for materials. No allocation has been made to the Clarendon school district or any other school districts and not even application blanks have, as yet, been printed. But according to Mr. Crow, the Clarendon authorities have requested him to send them blanks for this purpose if, as and when they come into being. Can we seriously consider this a bona-fide attempt to provide equal facilities for our school children?

On the other hand, the Plaintiffs brought many witnesses, some of them of national reputation in various educational fields. It is unnecessary for me to review or analyze their testimony. But they who had made studies of education and its effect upon children, starting with the lowest grades and studying them up through and into high school, unequivocally testified that aside from inequality in housing appliances and equipment, the mere fact of segregation, itself, had a deleterious and warping effect upon the minds of children. These witnesses testified as to their study and researches and their actual tests with children of varying ages and they showed that the humiliation and disgrace of being set aside and segregated as unfit to associate with others of different color had an evil and ineradicable effect upon the mental processes of our young which would remain with them and deform their view on life until and throughout their maturity. This applies to white as well as Negro children. These witnesses testified from actual study and tests in various parts of the country, including tests in the actual Clarendon School district under consideration. They showed beyond a doubt that the evils of segregation and color prejudice come from early training. And from their testimony as well as from common experience and knowledge and from our own reasoning, we must unavoidably come to the conclusion that racial prejudice is

something that is acquired and that that acquiring is in early childhood. When do we get our first ideas of religion, nationality, and the other basic ideologies? The vast number of individuals follow religious and political groups because of their childhood training. And it is difficult and nearly impossible to change and eradicate these early prejudices, however, strong may be the appeal to reason. There is absolutely no reasonable explanation for racial prejudice. It is all caused by unreasoning emotional reactions and these are gained in early childhood. Let the little child's mind be poisoned by prejudice of this kind and it is practically impossible to ever remove these impressions however many years he may have of teaching by philosophers; religious leaders or patriotic citizens. If segregation is wrong then the place to stop it is in the first grade and not in graduate colleges.

From their testimony, it was clearly apparent, as it should be to any thoughtful person, irrespective of having such expert testimony, that segregation in education can never produce equality and that it is an evil that must be eradicated. This case presents the matter clearly for adjudication and I am of the opinion that all of the legal guideposts, expert testimony, common sense and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and must go now.

Segregation is per se inequality.

As heretofore shown, the courts of this land have stricken down discrimination in higher education and have declared unequivocally that segregation is not equality. But these decisions have pruned away only the noxious fruits. Here in this case, we are asked to strike its very root. Or rather, to change the metaphor, we are asked to strike at the cause of infection and not merely at the symptoms of disease. And if the courts of this land are to render justice under the laws without fear or favor, justice for all men and all kinds of men, the time to do it is now and the place is in the elementary schools where our future citizens learn their first lesson to respect the dignity of the individual in a democracy.

To me the situation is clear and important, particularly at this time when our national leaders are called upon to show to the world that our democracy means what it says and that it is a true democracy and there is no under-cover suppression of the rights of any of our citizens because of the pigmentation of their skins. And I had hoped that this Court would take this view of the situation and make a clear cut declaration that the State of South Carolina should follow the intendment and meaning of the Constitution of the United States and that it shall not abridge the privileges accorded to or deny equal protection of its laws to any of its citizens. But since the majority of this Court feel otherwise, and since I cannot concur with them or join in the proposed decree, this Opinion is filed as a Dissent.

(S.) J. WATIES WARING,
United States District Judge.

Charleston, South Carolina
Date: June 21, 1951

A True Copy, Attest
(S.) ERNEST L. ALLEN,
Clerk of U. S. District Court
East. Dist. So. Carolina

APPENDIX "B"

Arkansas: *Brown* v. *Ramsey*, 185 F. (2d) 225 (C.C.A., 8th); *Black* v. *Lenderman*, 156 Ark. 476, 246 S. W. 876; *State ex rel. Black* v. *Board of Directors*, 154 Ark. 176, 242 S. W. 545; *Wesley* v. *Baker*, 153 Ark. 529, 241 S. W. 14; *Maddox* v. *Neal*, 45 Ark. 121; *County Court* v. *Robinson*, 27 Ark. 116.

Delaware: See *Board of Education* v. *Griffin*, 9 Houston 334, 32 A. 775.

District of Columbia: *Carr* v. *Corning*, 182 F. (2d) 14 (D. C.); *Wall* v. *Oyster*, 36 App. D. C. 50.

Georgia: *Cumming* v. *Board of Education*, 103 Ga. 641; 29 S. E. 488, affirmed 175 U. S. 528; *Reid* v. *Mayor of Eatonton*, 80 Ga. 755, 6 S. E. 602. See also *State Board of Edu-*

cation v. *Board of Public Education*, 186 Ga. 783, 199 S. E. 641; *Blodgett* v. *Board of Education*, 105 Ga. 463, 30 S. E. 561.

Kentucky: *Woodford County Board of Education* v. *Board of Education*, 264 Ky. 245, 94 S. W. (2d) 687; *Warren* v. *Board of Education*, 258 Ky. 212, 79 S. W. (2d) 681; *Board of Education* v. *Fultz*, 241 Ky. 265, 43 S. W. (2d) 707; *County Board of Education* v. *Bunger*, 240 Ky. 155, 41 S. W. (2d) 931; *State Board of Education* v. *Brown*, 232 Ky. 434, 23 S. W. (2d) 948; *Raley* v. *Board of Education*, 224 Ky. 56, 5 S. W. (2d) 484; *Louisville, H. & St. L. Ry.* v. *Powell*, 213 Ky. 563, 281 S. W. 532; *Commonwealth* v. *Sebree Deposit Bank*, 202 Ky. 589, 260 S. W. 388; *Fall* v. *Read*, 194 Ky. 135, 238 S. W. 137; *Wright* v. *Lyddan*, 191 Ky. 58, 229 S. W. 74; *City of Pineville* v. *Moore*, 190 Ky. 357, 227 S. W. 477; *Shadrock* v. *Board of Trustees*, 188 Ky. 345, 222 S. W. 78; *Mueller* v. *Phillips*, 186 Ky. 657, 217 S. W. 1010; *Moss* v. *City of Mayfield*, 186 Ky. 330, 216 S. W. 842; 181 Ky. 303, 204 S. W. 86, 181 Ky. 810, 205 S. W. 904; *Trustees of Colored Schools* v. *Trustees of White Schools*, 180 Ky. 574, 203 S. W. 520; *Daviess County Board of Education* v. *Johnson*, 179 Ky. 34, 200 S. W. 313; *Miller* v. *Feather*, 176 Ky. 268, 195 S. W. 449; *Board of Trustees* v. *West*, 163 Ky. 568, 174 S. W. 10; *Thornton* v. *White*, 162 Ky. 796, 173 S. W. 167; *Grady* v. *Larue County Board of Education*, 149 Ky. 49, 147 S. W. 928; *Mullins* v. *Belcher*, 142 Ky. 673, 134 S. W. 1151; *Prouse* v. *Board of Education*, 134 Ky. 365, 120 S. W. 307; *Crosby* v. *City of Mayfield*, 133 Ky. 215, 117 S. W. 316; *Cross* v. *Board of Trustees*, 121 Ky. 469, 89 S. W. 506; *Board of Trustees* v. *Morris*, 24 Ky. L. 1420, 71 S. W. 654; *Harrodsburg District* v. *Colored School District*, 49 S. W. 538 (Ky.); *Davenport* v. *Cloverport*, (D. C., D. Ky.) 72 F. 689 (D. Ky.); *Roberts* v. *Louisville School Board*, 16 Ky. L. 181, 26 S. W. 814; *Eakins* v. *Eakins*, 20 S. W. 285 (Ky.); *Norman* v. *Boaz*, 85 Ky. 557, 4 S. W. 316; *Dawson* v. *Lee*, 83 Ky. 49; *Claybrook* v. *City of Owensboro*, 16 F. 297 (D. Ky.); *Marshall* v. *Donovan*, 73 Ky. 681. See also *Thornton* v. *White*, 162 Ky. 796, 173 S. W. 167; *Munfordville Mercantile Co.* v. *Board of Trustees*, 155 Ky. 382, 159 S. W. 954; *Commonwealth ex rel. Trustees* v. *Ferguson*, 128 S. W. 95 (Ky.); *Taylor* v. *Russell*, 117 Ky. 539, 78 S. W. 411; *Hickman College* v. *Trustees*, 117 Ky. 944, 65

S. W. 20; *Board of Education* v. *Trustees of Colored School District*, 18 Ky. L. 103, 35 S. W. 549.

Louisiana: *Bertonneau* v. *Board of School Directors*, 3 Woods 177, 3 Fed. Cas. 294 No. 1361 (C.C. Ky.). See also *State ex rel. Dellande* v. *School Board*, 33 La. Ann. 1469.

Maryland: *Williams* v. *Zimmerman*, 172 Md. 568, 192 A. 353.

Mississippi: *Bryant* v. *Barnes*, 106 S. 113 (Miss.); *Rice* v. *Gong Lum*, 139 Miss. 760, 104 S. 105, affirmed 275 U. S. 78; *Barrett* v. *Cedar Hill Consolidated School District*, 123 Miss. 370, 85 S. 125; *Trustees* v. *Board of Supervisors*, 115 Miss. 117, 75 S. 833; *Moreau* v. *Grandich*, 114 Miss. 560, 75 S. 434; *McFarland* v. *Goins*, 96 Miss. 67, 50 S. 493; *Christman* v. *City of Brookhaven*, 70 Miss. 477, 12 S. 458. See also *Myers* v. *Board of Supervisors*, 156 Miss. 251, 125 S. 718; *Bond* v. *Tij Fung*, 148 Miss. 462, 114 S. 332.

Missouri: *State ex rel. Herman* v. *St. Louis County Court*, 311 Mo. 167, 277 S. W. 934; *Dehart* v. *School District*, 214 Mo. App. 651, 263 S. W. 242; *State ex rel. Logan* v. *Shouse*, 257 S. W. 827 (Mo. App.); *State ex rel. Carrollton School District* v. *Gordon*, 231 Mo. 547, 133 S. W. 44; *State ex rel. Morehead* v. *Cartwright*, 122 Mo. App. 257, 99 S. W. 48; *Lehew* v. *Brummell*, 103 Mo. 546, 15 S. W. 765; *State ex rel. Humphries* v. *Thompson*, 64 Mo. 26.

North Carolina: *Blue* v. *Durham Public School District*, 95 F. Supp. 441 (M. D. N. C.); *Messer* v. *Smathers*, 213 N. C. 183, 195 S. E. 376; *Galloway* v. *Board of Education*, 184 N. C. 245, 114 S. E. 165; *Medlin* v. *County Board of Education*, 167 N. C. 239, 83 S. E. 483; *Johnson* v. *Board of Education*, 166 N. C. 468, 82 S. E. 832; *Whitford* v. *Board of Commissioners*, 159 N. C. 160, 74 S. E. 1014; *Williams* v. *Bradford*, 158 N. C. 36, 73 S. E. 134; *Bonitz* v. *Trustees of Ahoskie School District*, 154 N. C. 375, 70 S. E. 735; *Gilliland* v. *Board of Education*, 141 N. C. 482, 54 S. E. 413; *Smith* v. *School Trustees*, 141 N. C. 143, 53 S. E. 524; *Lowery* v. *School Trustees*, 140 N. C. 33, 52 S. E. 267; *Hooker* v. *Town of Greenville*, 130 N. C. 472, 42 S. E. 141; *Hare* v. *Board of Education*, 113 N. C. 10, 18 S. E. 55; *McMillan* v. *School Committee*, 107 N. C. 609, 12 S. E. 330; *Duke* v. *Brown*, 96 N. C. 127, 1 S. E. 873; *Markham* v. *Manning*, 96 N. C. 132, 2 S. E. 40; *Riggsbee* v. *Town of Durham*, 94 N. C. 800; *Puitt* v. *Gas-*

ton County Commissioners, 94 N. C. 709. See also *Storey* v. *Board of Commissioners*, 184 N. C. 336, 114 S. E. 493.

Oklahoma: *Muskogee School District* v. *Hunnicutt*, 51 F. (2d) 528 (E. D. Okl.) affirmed 283 U. S. 810; *American State Bank of Boynton* v. *Board of Commissioners*, 143 Okl. 1, 286 P. 902; *Board of Commissioners* v. *School District*, 137 Okl. 193, 279 P. 326; *Board of Commissioners* v. *School District*, 135 Okl. 248, 275 P. 302; *School District* v. *Board of Commissioners*, 135 Okl. 1, 275 P. 302; *Moore* v. *Porterfield*, 113 Okl. 234, 241 P. 346; *State ex rel. Gumm* v. *Albritton*, 98 Okl. 158, 224 P. 511; *Jones* v. *Board of Education*, 90 Okl. 233, 217 P. 400; *Jelsma* v. *Butler*, 80 Okl. 46, 194 P. 436; *Jumper* v. *Lyles*, 77 Okl. 57, 185 P. 1084; *Cole* v. *District School Board*, 32 Okl. 692, 123 P. 426; *Olson* v. *Logan County Bank*, 29 Okl. 391, 118 P. 572; *School District* v. *Overholser*, 17 Okl. 147, 87 P. 665; *Board of Education* v. *Board of Commissioners*, 14 Okl. 322, 78 P. 455; *School District* v. *Cap. Nat. Bank*, 7 Okl. 45, 54 P. 309; *Porter* v. *County Commissioners*, 6 Okl. 550. See also *School District* v. *Crack County Commissioners*, 135 Okl. 1, 275 P. 292; *Board of Education of Sapulpa* v. *Board of Commissioners*, 127 Okl. 132, 260 P. 22; *Board of Education* v. *Excise Board*, 86 Okla. 24, 206 P. 517; *Lusk* v. *White*. 68 Okl. 316, 173 P. 1128; *Cotteral* v. *Barker*, 34 Okl. 533, 126 P. 211.

South Carolina: *Powell* v. *Hargrove*, 136 S. C. 345, 134 S. E. 380; *Tucker* v. *Blease*, 97 S. C. 303, 81 S. E. 668.

Tennessee: *Greenwood* v. *Rickman*, 145 Tenn. 361, 235 S. W. 425.

Virginia: *Carter* v. *School Board of Arlington County*, 182 F. (2d) 531 (C.C.A., 4th) reversing 87 F. Supp. 745; *Corbin* v. *County School Board of Pulaski County*, 177 F. (2d) 924 (C.C.A., 4th) Reversing 84 F. Supp. 253; *Smith* v. *School Board of King George County*, 82 F. Supp. 167 (E. D. Va.); *Ashley* v. *School Board of Gloucester County*, 82 F. Supp. 167 (E. D. Va.); *Eubank* v. *Boughton*, 98 Va. 499, 36 S. E. 529; *Kinnaird* v. *Miller's Exor.*, 25 Grat. 107.

West Virginia: *Williams* v. *Board of Education*, 45 W. Va. 199, 31 S. E. 985; *Martin* v. *Board of Education*, 42 W. Va. 514, 26 S. E. 348.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 273

HARRY BRIGGS, JR., ET AL.,

Appellants,

vs.

R. W. ELLIOTT, CHAIRMAN, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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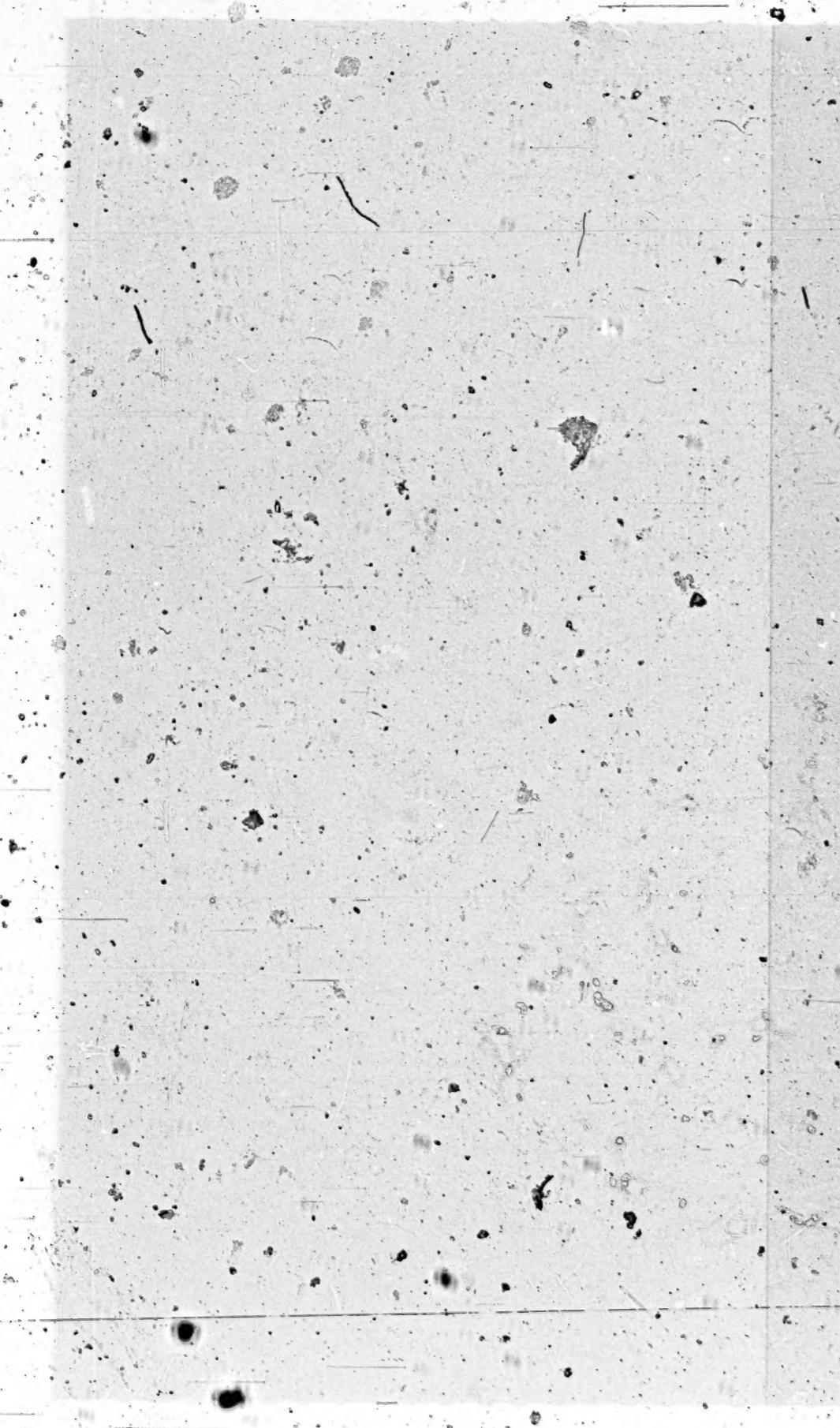

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SUPREME COURT OF THE UNITED STATES

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HARRY BRIGGS, JR., ET AL.,

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Appellees.

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS AND MOTION TO AFFIRM

Appellees seek to avoid review of the decision of the Court below by asserting: (1) that the question of the validity of statutes requiring segregation of the races in elementary and high schools can not be questioned in the light of the decisions of this Court in *Plessy* v. *Ferguson*, 163 U. S. 537; *Cumming* v. *Board of Education*, 175 U. S. 528; and *Gong Lum* v. *Rice*, 275 U. S. 78; and (2) that more recent decisions of this Court including the cases of *Sweatt* v. *Painter*, 339 U. S. 629; and *McLaurin* v. *State Board of Regents*, 339 U. S. 637 are not applicable because the *Sweatt* case involved a law school and the *McLaurin* case was limited to graduate education.

Neither *Plessy* v. *Ferguson, supra*, *Cumming* v. *Board of Education, supra*, nor *Gong Lum* v. *Rice, supra*, preclude a review of the decision in this case. *Plessy* v. *Ferguson* was presented to this Court on a record which itself assumed equality. The validity of racial segregation was not in issue in *Cumming* v. *Board of Education* which was decided on the question of the impropriety of the remedy sought. In *Gong Lum* v. *Rice*, the gravamen of the action was the objection of a Chinese child to being classified as a colored person for school purposes.

The record in the instant case presents for the first time competent, uncontradicted expert testimony sufficient to enable this Court to make a critical analysis of the constitutionality of statutes requiring racial segregation in elementary and high schools. No such evidence appeared in the records of any of the cases considered controlling by the appellees.

The testimony in the record in this case clearly distinguishes it from the above cited cases. If, however, the separate but equal doctrine of these cases is considered applicable then it should be reexamined in the light of facts now revealed for the first time in the present record.

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying,

contrary to the recent decision in *Grovey v. Townsend*, the well established principle of the Fifteenth Amendment forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled." *Smith* v. *Allwright*, 321 U. S. 649, 665-6.

The issue in the case of *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, was "whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race." (at p. 638). The unanimous opinion of this Court decided: "Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races." (at p. 642).

The issue in the instant case is whether a state which undertakes to provide public education on the elementary and high school levels for its residents can satisfy the requirements of the equal protection clause of the Fourteenth Amendment if it compels the segregation of Negro pupils from all other pupils. The uncontradicted testimony of appellants' expert witnesses show that compulsory racial segregation of pupils was harmful to the segregated students on the elementary and high school levels and deprived them of educational opportunities and advantages equal to those enjoyed by white students.

This Court found racial separation harmful and a deprivation of the equal protection of the laws in the *McLaurin* and *Sweatt* cases based upon expert testimony of the nature presented at the trial of this case. In the majority opinion the court below distinguished these two cases on the grounds that they were meant to be applicable to only graduate and professional education, whereas the dissenting judge felt that rationale of the *McLaurin* and *Sweatt* cases should be applied in the disposition of this case.

In another recent case[1] expert testimony similar to that introduced in the instant case showed the effect of racial segregation upon public school pupils in Topeka, Kansas. The three-judge court of the United States District Court for the District of Kansas included in its Findings of Fact a finding that: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

In its opinion the Court said: "It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in *McLaurin* v. *Oklahoma*, 339 U. S. 637, and *Sweatt* v. *Painter*, 339 U. S. 629 . . . show a trend away from the *Plessy* and *Lum* cases."

". . . If segregation within a school as in the *McLaurin* case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the *Sweatt* case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades."

The court, however, was of the view that the *Sweatt* and *McLaurin* cases were limited to graduate and professional

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[1] *Brown* v. *Board of Education of Topeka*, Civil Action No. T-316, Decided August 3, 1951.

education. "We are accordingly of the view," the court concluded, "that the *Plessy* and *Lum* cases . . . have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades."

"The prayer for relief will be denied and judgment will be entered for defendants with costs."

Thus both in this case and in the *Topeka* case, *supra*, lower courts have concluded that the principles enunciated in the *McLaurin* and *Sweatt* cases are applicable to questions of equal educational opportunities at the graduate and professional school level only. Yet, that this is not the view of this Court is apparent from its disposition of *Rice* v. *Arnold*, — U. S. —, decided Oct. 10, 1950.

If a question involving segregation in the use of a municipal golf course must be remanded to the court below for reconsideration in the light of the *Sweatt* and *McLaurin* cases, as in *Rice* v. *Arnold*, it seems evident that the rationale of these two decisions necessarily governs a determination as to whether equal educational opportunities have been furnished at the elementary and high school level. Certainly the instant cause should be reviewed to remove any ambiguity with respect to this question.

Appellees' Motion to Dismiss Should Be Denied

The appellees take the position that this was an action for a declaratory judgment to declare the Negro schools of Clarendon County, South Carolina, unequal to the white schools of that county and to enjoin the enforcement of the statutes of South Carolina requiring racial segregation in public schools—that there were two causes of action, one which was finally determined and one which has not been finally decided.

Appellants contend that there is but one cause of action, that is, the effort to enjoin the enforcement of the statutes

of South Carolina requiring the segregation of the races in public schools. This issue was clearly raised in the pleadings, was supported by competent testimony and was decided by the District Court.

The appellees, having amended their answer to admit the inequalities in physical facilities of the schools and having consented to an injunction against these inequalities, the only question in the case at the beginning of the trial was the question of the constitutionality of the statutes. This question was decided by the majority of the Court in its decree which held that the enforcement of these statutes did not violate the provisions of the Fourteenth Amendment and that appellants were "not entitled to an injunction forbidding segregation in the public schools of School District No. 22." The second paragraph of the decree ordered the appellees to "proceed at once to furnish to [Appellants] and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils."

Appellees contend that this order is not final or reviewable by this Court because of the last statement in the decree: "And it is further ordered that the defendants make report to this Court within six months of this date as to the action taken by them to carry out this order. And this cause is retained for further orders."

The one issue requiring a three-judge Court has been finally determined. The District Court refused to issue an injunction restraining the enforcement of the statutes in question. The other portion of the decree requiring equalization of physical facilities was likewise final. The court could not have intended, as appellees contend, that the appellees be given six months to equalize facilities, for to do so would be contrary to the decisions of this Court. *Sipuel v. Board of Regents*, 332 U. S. 631. In the absence

of a review by this Court all that remains is the question of enforcemen of the decree. All that is required is that the appellees report to the Court within six months of the "action taken by them to carry out *this order.*" (Italics ours.)

The latent powers of a court to reopen or revise its judgment does not prevent a judgment from being final. *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 551. In *Knox National Federal Loan Association* v. *Phillips,* 300 U. S. 194, in an action to retire shares of stock of a federal farm loan association where the lower court granted the relief, appointed a receiver and reserved the right to control the conduct of the officers and to rescind or modify its order, this Court stated at page 137:

> "The primary purpose of the suit was the recovery of a judgment for the par value of the shares. Any other relief prayed for or awarded was tributary to that recovery; it was a form of equitable execution to make collection possible. When the amount invested in the stock was adjudged to constitute a debt, whatever followed in the decree was auxiliary and modal."

In *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180, 183 a judgment containing a provision—"And the Court reserves to itself such further directions as may be necessary to carry this decree into effect, concerning costs, or as may be equitable and just"—was nevertheless a final judgment. This Court stated:

> "The whole purpose of the suit has been accomplished . . . the litigation of the case is terminated, and nothing now remains to be done, but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal."

See also: *Carondelet Canal and Nav. Co.* v. *Louisiana*, 233 U. S. 362; *St. Louis Iron Mt. and Southern Railway Co.* v. *Southern Express Co.*, 108 U. S. 24.

In the instant case the District Court ordered appellees to furnish to the Negro pupils of the district "educational facilities, equipment, curricula, and opportunities equal to those furnished white pupils." Under this decree the only thing remaining to be done is to furnish the facilities ordered. No further judicial question exists. The litigation of the parties as to the merits of the case is terminated. All that remains for the Court to do is to police its order. Such a decree is similar to the decrees where an equity court decides the issues in a case and orders an accounting. This Court has repeatedly held that such decrees are final. *Forgay* v. *Conrad*, 6 How. 201, 202; *Radio Station WOW* v. *Johnson*, 326 U. S. 120.

Thus, where the judgment disposes of the whole case on its merits and the court below has nothing to do but execute its decree its order is final. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

In making that determination this Court "will examine both the judgment and the opinion as well as other circumstances which may be pertinent." *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 548.

It should further be pointed out that there is no question but that the Court finally and definitely refused to grant the injunctive relief appellants were seeking—to enjoin enforcement of the Constitution and statutes of South Carolina, requiring segregation of the races, on the grounds of unconstitutionality. Such an order is clearly reviewable where the appeal is made pursuant to Title 28, Sections 1253 and 2101. *Eichholz* v. *Public Service Commission*, 306 U. S. 268.

Appellants, it is submitted, must seek a review of the lower court's decision at this time in order to avoid any obstacle to this Court's final determination as to whether the statute and constitutional provisions of South Carolina which require segregation of the races in public schools conform to the requirements of the equal protection clause of the Fourteenth Amendment.

Appellees' Motion to Affirm Should Be Denied.

Appellants' rights to the equal protection of the laws are present and personal. *Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.* At the time of the judgment in this case appellants were entitled to a decree enforcing these rights. The only way this could have been done would have been to order that appellants be admitted into the schools set aside solely and exclusively for white pupils in School District No. 22 and in the Summerton High School District without segregation or discrimination. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sweatt* v. *Painter, supra; Wilson* v. *Board of Supervisors,* 94 L. Ed. (Ad. Op.) 200; *McKissick* v. *Carmichael,* 187 F. 2d 949.

To affirm the judgment in this case would be to establish a precedent that the rationale of the *Sweatt* and *McLaurin* decisions could not be applied to a case involving elementary and high school education. An affirmance of the judgment in this case would also mean that appellants' rights to the equal protection of the laws could be postponed to a future date.

Conclusion

The majority opinion of the District Court subordinated the individual rights of appellants to the state's segregation policy. The rationale of the *Sweatt* and *McLaurin* cases,

supra, was disregarded. Although the Supreme Court has clarified the issue as to graduate and professional schools, the Court has never had the opportunity to consider the question as to elementary and high schools on the basis of a full and complete record with the issue clearly drawn and with competent expert testimony as appears in the record in this case. A clear-cut decision on this issue will remove all doubts in the field of public education.

For the foregoing reasons, appellees' motion to dismiss and motion to affirm should be denied.

Respectfully submitted,

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FILED
AUG 24 1951
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 273

HARRY J. BRIGGS, JR., ET AL.,

Appellants,

vs.

R. W. ELLIOTT, CHAIRMAN, J. D. CARSON AND GEORGE KENNEDY, MEMBERS OF THE BOARD OF SCHOOL DISTRICT NO. 22, CLARENDON COUNTY, S. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

S. E. ROGERS,
ROBERT McC. FIGG, JR.,
Counsel for Appellees.

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Section 2281 2
Section 2284 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 273

HARRY J. BRIGGS, JR., ET AL.,

Appellants,

versus

R. W. ELLIOTT, CHAIRMAN, ET AL.,

Appellees

STATEMENT OF APPELLEES AS TO JURISDICTION AND MOTIONS TO DISMISS AND AFFIRM

Statement of Appellees as to Jurisdiction

Under Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, as amended, the appellees file this statement as to matters making against the jurisdiction of the Court asserted by the appellants.

This matter had its genesis in a petition filed by the appellants, or most of them, with the Board of Trustees of School District No. 22 of Clarendon County, South Carolina, and other school authorities of the county, alleging that the educational facilities furnished the infants and other qualified Negro pupils residing in the school district and attending the elementary, grammar and high school grades therein were not equal to those furnished to white pupils of the district, and praying that discrimination

against them cease, and that educational advantages and facilities equal in all respects to those provided for white pupils be made available to them. (Exhibit A of the Answer.)

The instant action was commenced subsequent to a denial of the petition by the Board of Trustees, which was based on a finding that the facilities afforded to the white and Negro children of the district, though separate, were substantially equal. (Exhibit B of the Answer.)

This action is for a declaratory judgment declaring the rights and legal relations of the parties, "in order that such declaration shall have the force and effect of a final judgment or decree." The complaint, paragraph 11, alleges that the public schools of Clarendon County set apart for white students and from which all Negro students are excluded are superior in plant, equipment, curricula, and in other material respects to the schools set apart for Negro students, and the appellants predicate their claim for relief on two questions alleged to be in actual controversy between the parties, namely, (1) that the constitutional and statutory provisions of the State of South Carolina providing for separate schools for the white and colored races are unconstitutional *per se* under the Fourteenth Amendment, and (2) that the appellees have not furnished to the appellants separate educational opportunities, advantages, and facilities which are equal to those afforded and available to white children of public school age similarly situated, and that this constitutes a denial of equal protection of the laws under the Fourteenth Amendment.

The cause was tried before a Special District Court of three Judges convened under Title 28, United States Code, Sections 2281 and 2284. At the trial the appellees, with leave of the Court, filed an amendment to their answer admitting on the record that the educational facilities, equip-

ment, curricula, and opportunities afforded in the school district for colored pupils of elementary and secondary grades were not substantially equal to those afforded in the district for white pupils, and stating that the finding of substantial equality by the Board of Trustees in denying the petition was arrived at by a process of addition and subtraction of advantages afforded to one race balanced against those afforded to the other, a method of determining equivalency which was subsequently rejected by the Court of Appeals for the Fourth Circuit in *Carter v. School Board of Arlington County*, 182 F. 2d 531.

The majority decision of the Three Judge Court overruled the contention of the Appellants that the constitutional and statutory provisions of the State requiring separate schools for the two races are unconstitutional *per se* under the Fourteenth Amendment, but found that the educational facilities, equipment, curricula and opportunities afforded in the school district for colored pupils are not substantially equal to those afforded for white pupils, and that this inequality violated the equal protection clause of the Fourteenth Amendment.

The Court's order provided that the appellees proceed at once to furnish to the appellants and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils, that they make report to the Court within six months as to the action taken by them to carry out the orders, and that the cause is retained for further orders.

In connection with the exercise of its discretion, the Court had before it evidence that the white schools, provided for 277 enrolled pupils, could not physically receive and house either the 866 enrolled colored pupils or the total enrollment of 7,143 white and colored pupils in the district's schools; and had before it also the 1951 South Carolina

school legislation making substantial amounts of State funds available to the school districts of the State for the construction and equipment of school buildings, as well as the transportation of all pupils to and from schools, to provide ~~which a~~ 3% sales tax was enacted and the issuance of State bonds for the purpose was authorized.

The action to be taken by the appellees to comply with the order was not prescribed by the Court; this was left to the appellees to determine, with the question whether equality had been accomplished by them to be considered by the Court thereafter, and the controversy to be finally concluded one way or the other at that time by further order.

The cause is clearly still pending before the Special District Court of three Judges, and will be until there has been a final determination upon the question whether the appellees can furnish and have furnished equal educational facilities, equipment, curricula and opportunities to the appellants and other Negro pupils of the district. Until the Court has determined that separate equal educational facilities, equipment, curricula and opportunities can be and have been furnished, the question whether the constitutional and statutory provisions of the State challenged by the appellants are unconstitutional *per se* is not ripe for decision. *Sweatt* v. *Painter*, (1950) 339 U. S. 629, 631.

Motion to Dismiss Appeal

Come now the appellees, R. W. Elliott, Chairman, and others, and move the Court to dismiss the appeal herein upon the ground that the said appeal is premature and improvidently taken, in that the Court below has not finally determined the controversy between the parties, and that the question sought to be presented in this appeal is not ripe for decision prior to such final determination by the Court below, and its final action thereon.

In support of their motion to dismiss, the appellees respectfully show as follows:

The present appeal is purely interlocutory, and concerns the disposition of only one of the issues upon which the relief sought by the appellants was predicated. It is not from a final judgment in the cause, declaring the rights and legal relations of the parties, "in order that such declaration shall have the force and effect of a final judgment or decree," as prayed in the complaint.

It is well settled that this Court will not review by "piecemeal" or "in fragments." *Louisiana Nav. Co.* v. *Oyster Commission* (1912), 226 U. S. 99, 101. "To be appealable, the judgment must be, not only final, but complete." *Collins* v. *Miller* (1920), 252 U. S. 364, 370. To provide the jurisdiction for review by this Court, the decree sought to be reviewed must be final as to the whole subject matter of the proceedings and of all the causes of action involved. *Arnold* v. *United States* (1923), 263 U. S. 427; *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.* (1916), 243 U. S. 251, 256; and *Republic Natural Gas Co.* v. *Okla.* (1948), 334 U. S. 62, 67 and 68.

The petition for appeal herein seeks to escape these established principles by limiting its appeal to an attack upon the validity *per se* of State action providing for separate schools under the Fourteenth Amendment, and by disregarding entirely the other phase of the case relating to the ability of the appellants to provide equality of facilities which is still pending without final determination in the lower Court. It might be that if this Court should reverse the lower Court on the constitutionality of separate schools *per se*, that would render academic the second phase of the cause which, in principle, was decided favorably to the appellants. But, should this Court uphold the unbroken authority of repeated State and Federal decisions and

recognize the legality of traditional and long standing Congressional and State legislation providing for separate schools, the other aspect of the case remains a live and finally undetermined issue until the lower Court ascertains and decides in its final judgment whether equality of facilities can be and have been furnished the petitioners.

The decision reserved is not a mere ministerial act; judicial judgment is involved in that determination. And the decision of the lower Court on that question must be reviewable under a proper state of facts by this Court. In other words, another review of this proceeding by appeal to this Court could thereupon arise. This cause presents the dilemma envisaged in *Collins* v. *Miller* (1920), 252 U. S. 364, 371, where the Court, in dismissing an appeal, said: "Only one branch of the case has been finally disposed of below; therefore none of it is ripe for review by this court."

It is respectfully submitted that the present appeal should be dismissed as premature and not from the final action of the lower Court, and that the determination of the constitutionality *vel non* of the State's constitutional and statutory provisions now sought to be presented in this appeal should await the final determination of the lower Court as to whether equality can be and has been provided by the appellees in compliance with the Court's order, and the final action of the lower Court in the light of its findings thereon. *Sweatt* v. *Painter* (1950), 339 U. S. 629, 631.

Motion to Affirm

Come now the appellees, R. W. Elliott, Chairman, and others, and, as an alternative to their motion to dismiss hereinbefore set forth, do move the Court to affirm the order appealed from on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, in view of the pre-

vious decisions of this Court concerning the validity under the Fourteenth Amendment of constitutional and statutory provisions of a State providing for separate public elementary and secondary schools for the white and colored races.

Missouri ex rel Gaines v. *Canada*, 305 U. S. 337.
Gong Lum v. *Rice*, 275 U. S. 78.
Berea College v. *Kentucky*, 211 U. S. 45.
Cumming v. *Board of Education*, 175 U. S. 528.
Plessy v. *Ferguson*, 163 U. S. 537.

In *Gong Lum* v. *Rice, supra*, the Supreme Court itself held that the question sought to be presented by this appeal "is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the Federal courts under the Federal Constitution," that the "right and power of the State to regulate the method of providing for the education of its youth at public expense is clear," and that the decision "is within the discretion of the State in regulating its public schools and does not conflict with the Fourteenth Amendment."

The power of a State to provide separate schools for the white and colored races was recognized and upheld prior to the adoption of the Fourteenth Amendment. *Roberts* v. *City of Boston*, 5 Cush. 198.

The decisions of State and Federal courts interpreting the Fourteenth Amendment within a few years of its proposal by the Congress and its ratification by the States all held that the equal protection clause was not intended to and did not limit State power to provide separate schools. *State ex rel Garnes* v. *McCann* (1871), 21 Oh. St. 198; *Cory* v. *Carter* (1874), 48 Ind. 327; *Ward* v. *Flood* (1874), 48 Cal. 36; *Bertonneau* v. *Board of Directors* (1878), 3 Woods 177, S. C. 3 Fed. Cas. 294, Case No. 1, 361; *People ex rel*

King v. *Gallagher* (1883), 93 N. Y. 438. These cases and others were cited with approval of their interpretation of the Amendment in *Plessy* v. *Ferguson, supra*, and in *Gong Lum* v. *Rice, supra*.

The same Congress which wrote and proposed the Fourteenth Amendment also enacted legislation providing for separate schools in the District of Columbia, and that Congress and those immediately following it consistently refused to include measures to prohibit the establishment of separate schools by the States in the several Civil Rights Acts. Compare *Cory* v. *Carter, supra; Carr* v. *Corning*, 182 F. 2d 14; and, *inter alia*, 42nd Cong., 2nd Sess., pp. 3271, 3734, 3735; 43rd Cong., 2nd Sess., pp. 937, 1010, 1011.

The appellants conceive that "the rationale of the decisions in *Sweatt* v. *Painter*, 229 U. S. 629, and *McLaurin* v. *Board of Regents*, 339 U. S. 637" supports their contention. In the *Sweatt* case a separate law school was enjoined because it was found that equality could not in fact be thereby afforded, in view of considerations peculiar to the requirements of a legal education, while in the *McLaurin* case discriminatory regulations imposed on a Negro student in the enjoyment of the single and only facility furnished students by the State were enjoined. It is clear, therefore, that these cases represent an application of, and not a departure from, the long-standing interpretation of the equal protection clause.[1]

The meaning of the equal protection clause of the Fourteenth Amendment which the appellants seek to challenge

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[1] The obvious differences in the problems presented by graduate and professional schools and elementary and high schools were noticed in the opinion of the Court below, and referred to in the testimony. (R. 178, 179.) Appellants' counsel stated to the Court in his summation: "I grant there is a difference between university and college levels and elementary and high school levels. I agree there is a difference. Of course there is a difference." (R. 273.) As the Court below held, "as good education can be afforded in Negro schools as in white schools."

in this appeal has been long settled by judicial decisions, Federal and State, and by Congressional action, both in its consideration of the Civil Rights legislation enacted to enforce the Amendment and in its legislative regulation of the schools of the District of Columbia. There is not a single judicial decision or a single action of the Congress since the adoption of the Amendment which departs from that interpretation, or sustains the position of the appellants.

As held in the majority opinion of the Court below:

> "* * * when seventeen states and the Congress of the United States have for more than three quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Justices Stones, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The Constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts."

It is respectfully submitted that the single question sought to be presented by the appeal is one which is conclusively settled against the contention of the appellants by the previous decisions of the Supreme Court, and that the motion of the appellees to affirm the order appealed *from* should be granted. Compare *Schnell* v. *Davis*, (1949) 336

U. S. 933; *Hodges* v. *Snyder*, (1923) 261 U. S. 600, 601; *City of Boston* v. *Jackson*, (1922) 260 U. S. 309, 314; *Chicago, I. R. & Pac. R. Co.* v. *Devine*, (1915) 239 U. S. 52, 54; *Missouri Pac. R. Co.* v. *Castle*, (1912) 224 U. S. 541, 544.

Respectfully submitted,

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